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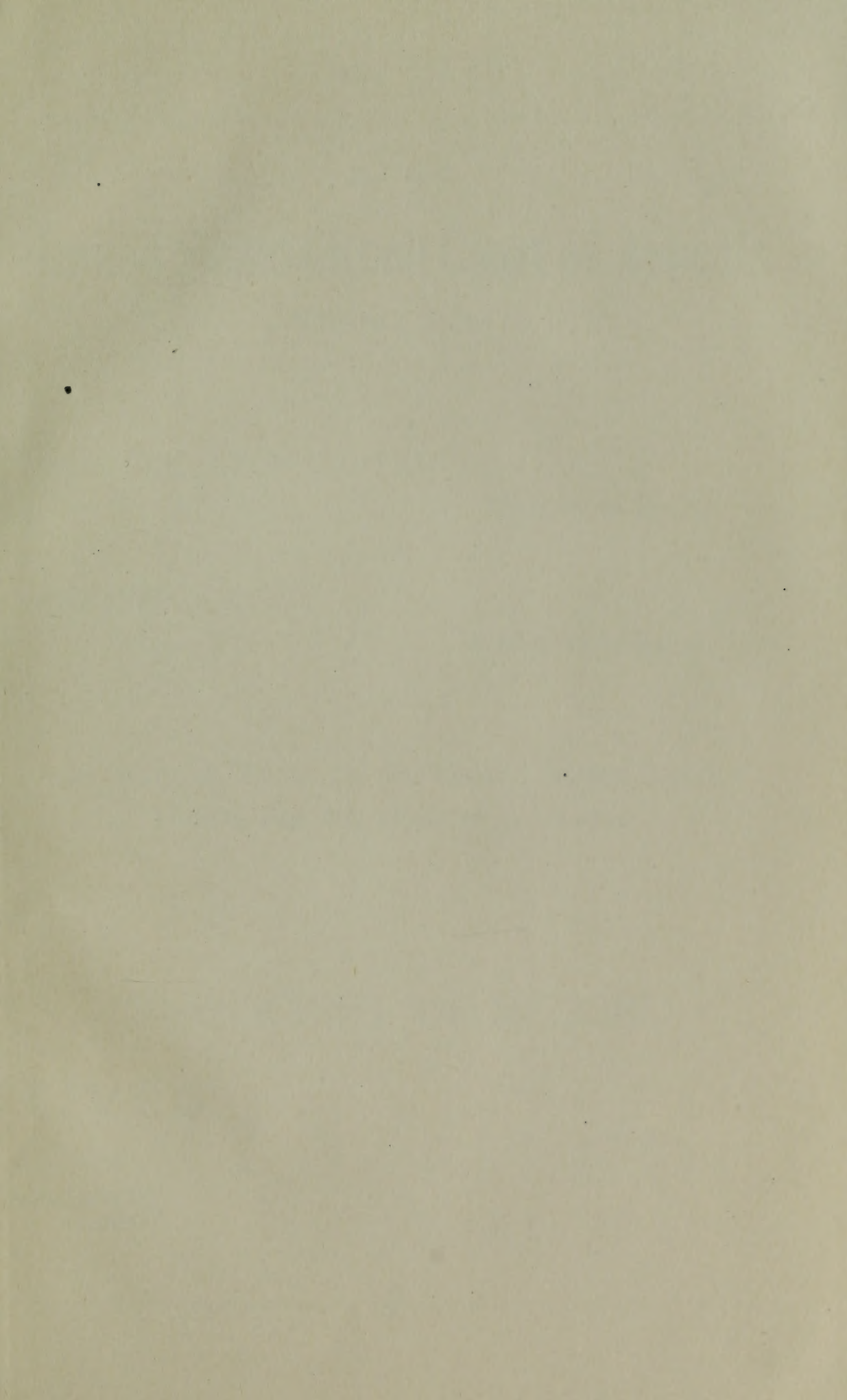
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IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

OTIS ELEVATOR COMPANY,

Plaintiff in Error,

VS.

CHRISTIAN LUCK,

Defendant in Error.

On Writ of Error to the United States District
Court, For the District of Oregon.

TRANSCRIPT OF RECORD.

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Court of Appeals
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On Writ of Error to the United States District
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TRANSCRIPT OF RECORD.

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

OTIS ELEVATOR COMPANY,
Plaintiff in Error,
vs.
CHRISTIAN LUCK,
Defendant in Error.

Names and Addresses of Attorneys upon this Writ:

For the Plaintiff in Error:

Griffith, Leiter & Allen,
Electris Building, Portland, Oregon

For the Defendant in Error:

C. W. Fulton,
Fenton Building., Portland, Oregon

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*In the District Court of the United States for the
District of Oregon.*

Be it remembersd, that on the 24 day of July, 1911,
there was duly filed in the Circuit Court of the
United States for the District of Oregon, a
Transcript on Removal in words and figures as
follows, to-wit:

[Complaint.]

*In the Circuit Court of the State of Oregon for
Multnomah County.*

CHRISTIAN LUCK, Plaintiff,

vs.

OTIS ELEVATOR COMPANY, a corporation,
Defendant.

The above named plaintiff, complaining of the
above named defendant, for his cause of action al-
leges:

I.

That the defendant is, and during all the time in
this complaint mentioned was, a private corporation
incorporated, organized and existing under the laws
of the State of New Jersey, and is and was during all
said time, as such corporation, engaged in the trans-
action of its corporate business in the State of Ore-
gon, and among other things the said defendant was
incorporated to engage in the enterprise and business
of selling, installing and erecting elevators.

II.

That heretofore on the 24th day of February, 1910,
plaintiff was and had been for some time prior there-

to in the employ of defendant in the capacity of mechanic and under and by the terms of such employment plaintiff was required to do and perform such work as should from time to time be required of him by defendant in the construction, erection and installation of elevators and among other work plaintiff was required to assist in the work of placing and connecting the casing in the well of plunger elevators erected by defendant. That on the 24th day of February, 1910, defendant was erecting and installing a plunger elevator in a building in the City of Portland, Oregon, and plaintiff was sent and directed by defendant to work as aforesaid thereon. That in the installation and erection of such elevator it became and was necessary to, and defendant did, dig a well approximately eighty-six feet in depth and three feet by three feet, six inches, in width, and to construct therein a casing to provide for the operation of such elevator, and as such casing was placed in such well and carried up from the bottom towards the top it was necessary to fill in around it with earth and gravel, which earth and gravel was let down into the well by means of an iron bucket attached to a cable and actuated and operated by machinery and appliances then and there employed by defendant for that purpose. That plaintiff entered upon such work and employment and was engaged thereat on the said 24th day of February, and in the course of his employment it became necessary for him, the plaintiff, to and he did, in the course of said employment, on said 24th day of February, 1910, descend into said well in order

to assist in uniting two sections of such casing. That it became and was the duty of the defendant to provide a suitable and safe place for the doing of such work by the plaintiff and to provide safe and suitable machinery and appliances for operating the said bucket and lowering it into the well.

III.

That the said bucket was an iron bucket about 17 inches square and 48 inches in length, and when filled, as hereinafter mentioned, weighed approximately five hundred (500) pounds. That when and while being lowered into such well, said bucket, as defendant then and there, and long prior thereto, well knew, would swing from side to side, and strike the sides of such well and any section or part of such casing then extending above the bottom of such well or above the point to which such well had then been filled; and, unless securely fastened to said cable, said bucket in so striking would be thrown off and separated from said cable. And it became and was the duty of defendant to so securely fasten and attach said bucket to said cable that in or by so swinging or striking it would not be thereby detached or unfastened from said cable. But the said defendant, disregarding its duty in the respects aforesaid, carelessly and negligently failed and neglected to securely or properly fasten the same to said cable, but on the contrary said defendant carelessly and negligently employed for the purpose of attaching said bucket to said cable an unsuitable and unsafe iron hook or device so formed that when said bucket would strike the side of the

well or strike said casing it would thereby be thrown off and separated from said hook and drop to the bottom of the well.

IV.

That this plaintiff was not informed of the unsafe nature or character of the said hook or the fact that it was liable at any time or at all to become unfastened or disconnected from the bucket, and had no notice whatever of the unsuitable or unsafe character of such hook, but this plaintiff avers that the said defendant well know for a long time prior to the 24th day of February, 1910, and for more than one month prior thereto, that the said hook was an unsafe and insecure device for fastening and connecting the said cable and bucket together, and well knew that it was liable at any time while descending into such well to become disconnected from said bucket and thereby cause or permit the same to drop into the well and in and upon any person who might be in such well; and said defendant so knowing the nature and character of such hook and that it was unsuitable for such purpose and having notice thereof, the said defendant did carelessly and negligently on the said 24th day of February, and while plaintiff was, as aforesaid, in said well, provide and direct the said unsuitable and unsafe hook to be used for the purpose of connecting and attaching the said bucket to the said cable and caused the said bucket so attached to be filled with earth and gravel and lowered into the said well while this plaintiff was there, as aforesaid, in the discharge of his duty and without any knowledge of the unsafe or

unsuitable nature or character of the said device employed, as aforesaid, for attaching the said bucket and the said cable together, and therupon the said bucket being so filled with earth and gravel was lowered into the said well, and while the said bucket was descending into the well and when it was within a distance of telve feet or thereabouts of and above this plaintiff the said bucket struck either the side of said well or said casing and said hook was thrown off and parted and separated from the said bucket, precipitating it and causing it, the said bucket, to fall into the well and in and upon this plaintiff, who was then and there exercising due care, diligence and caution, and the said bucket did then and there fall into the well and in and upon this plaintiff and struck the plaintiff's back and spine, knocking him down and inflicting a severe and permanent injury to his back and spine and by reason thereof the plaintiff became sick and ill and was confined to his bed for three weeks and suffered great bodily pain and was compelled to and did employ physicians and nurses to care for him and was unable to continue his usual or any work or vocation. And this plaintiff further avers that the injuries so inflicted on him were and are of a permanent nature and character so that he will never again regain his former strength or health and will never again be able to engage in the work or employment which he had followed and was wont to pursue prior thereto, or to perform any character or kind of work.

V.

That this plaintiff is of the age of twenty-eight

years and prior to said accident was a man of unusual strength and capacity for work and was regularly earning from thirty to fifty dollars per week in following his vocation as mechanic. That since said injuries said plaiitiff has been unable to perform such work or any work and consequently has been unable to earn any wages or salary because of his inability to work owing to said injuries inflicted as aforesaid.

VI.

That by reason of said negligence and want of care on the part of the said defendant in the selection and employment of the appliances aforesaid and of the wrongful, careless and negligent acts of defendant aforesaid this plaintiff was injured, as aforesaid, and by reason of such injury was and is damaged in the sum of Twenty Thousand (\$20,000) Dollars.

WHEREFORE, Plaintiff demands judgment against the defendant for the sum of Twenty Thousand Dollars, together with his costs and disbursements in this action.

C. W. FULTON,

Attorney for Plaintiff.

STATE OF OREGON,

County of Multnomah—ss.

I, Christian Luck, being first duly sworn, deposes and say, that I am the plaintiff in the above entitled action and that the above and foregoing complaint is true as I verily believe.

CHRISTIAN LUCK.

Subscribed and sworn to before me this 8th day of May, 1911.

(Seal.)

C. W. FULTON,

Notary Public for the tState of Oregon.

[Endorsed]: Filed May 8, 1911.

F. S. FIELDS,

Clerk.

By H. C. Smith,

Deputy.

[Summons.]

*In the Circuit Court of the State of Oregon,
for the County of Multnomah.*

CHRISTIAN LUCK,

Plaintiff,

vs.

OTIS ELEVATOR COMPANY, a corporation,

Defendant.

To Otis Elevator Company, a corporation, the above named defendant.

IN THE NAME OF THE STATE OF OREGON: You are hereby required to appear and answer the complaint filed against you in the above entitled action within ten days from the date of the service of this summons upon you, if served within this County, or if served within any other County of this State, then within twenty days from the date of the service of this summons upon you; and if you fail to answer for want thereof, the plaintiff will take judgment against you for the sum of twenty thousand dollars, and for his costs and disbursements in this action.

C. W. FULTON,

Attorney for Plaintiff.

STATE OF OREGON,

County of Multnomah—ss.

I, R. L. Stevens, Sheriff of said State and County, do hereby certify that I served the within Summons within said State and County, on the 9th day of May, 1911, on the within named defendant, Otis Elevator Company, a corporation, by personally delivering a copy thereof, prepared and certified to by C. W. Fulton, Attorney for the plaintiff, together with a copy of copy thereof, prepared and certified to by C. W. Fulton, Attorney for the plaintiff, to Arthur J. McComb, Statutory Agent and Attorney in fact for the said defendant corporation personally and in person.

R. L. STEVENS,

Sheriff of Multnomah County, State of Oregon.

By J. H. Bulger,

Deputy.

Received 4:00 P. M., May 8, 1911,

R. L. STEVENS,

Sheriff Multnomah County, Oregon.

By J. H. J., Deputy.

[Endorsed]: Filed May 13, 1911.

S. F. FIELDS,

Clerk.

By A. L. Buchtel,

Deputy.

[Petition for Removal.]

*In the Circuit Court of the State of Oregon,
for the County of Multnomah.*

CHRISTIAN LUCK,

Plaintiff,

vs.

OTIS ELEVATOR COMPANY, a corporation,
Defendant.

Petition for removal to the Circuit Court of the United States for the District of Oregon.

To the Honorable, The Circuit Court of the State of Oregon for the County of Multnomah, Honorable C. U. Gantenbein, Presiding Judge:

Your petitioner, Otis Elevator Company, defendant above named, respectfully shown to this Honorable Court that the said Otis Elevator Company is defendant in this action and that the same is of a civil nature and that the matter in dispute in this cause exceeds the sum or value of two thousand dollars, exclusive of interest and costs, to-wit: the sum of twenty thousand dollars.

That the controversy herein is between citizens and residents of different States; that the said Christian Luck, plaintiff above named was, at the time of the commencement of this action, ever since has been and still is a citizen and resident of the State of Oregon, residing at Portland, in Multnomah County, in said State, and your petitioner, Otis Elevator Company, a corporation, was at the time of the commencement of this action, ever since has been and still is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and a citizen and resident of said State of New Jersey and of no other State, and is not a citizen or resident of the State of Oregon.

That your petitioner desires to remove this action before the trial thereof into the next Circuit Court of the United States to be held in the District of Oregon, in Portland in said State and District. And your pe-

petitioner offers herewith good and sufficient bond and surety for its entering into the Circuit Court of the United States for the District of Oregon, on the first days of its next session, a copy of the record in this action, and for paying all costs that may be awarded by the said Circuit Court of the United States if the said Circuit Court of the United States shall hold that this action was wrongfully and improperly removed thereto.

And your petitioner herein prays that the said surety and bond may be accepted; that this action may be removed into the next Circuit Court of the United States to be held in the District of Oregon, pursuant to the Statutes of the United States in such cases made and provided, and that no further proceedings may be had herein in this Court, and that your Honorable Court will make an order approving said bond, and an order of removal of said action, and to that end the defendant and your petitioner will ever pray.

OTIS ELEVATOR COMPANY,

By R. S. Shepard,

Griffith & Leiter and F. J. Lonergan, Attorneys
for petitioner and Defendant as aforesaid.

STATE OF OREGON,

County of Multnomah—ss.

I, R. S. Shepard, being first duly sworn, depose and say that I am the Manager of the Otis Elevator Company, the defendant and petitioner above named; that I have read the foregoing petition and the whole thereof, and the same is true as I verily believe.

R. S. SHEPARD.

Subscribed and sworn to before me this nineteenth day of May, A. D., 1911.

F. J. LONERGAN,

(Notarial Seal)

Notary Public for Oregon.

STATE OF OREGON,

County of Multnomah—ss.

Due service of the within is hereby accepted in County, Oregon, this 19th day of May, 191.... by receiving a copy thereof, duly certified to as such, by attorney for

C. W. FULTON,

Attorney for Plaintiff.

[Endorsed]: Filed May 19, 1911.

F. S. FIELDS,

Clerk.

By A. L. Buchtel,

Deputy.

[Bond on Removal.]

*In the Circuit Court of the State of Oregon for the
County of Multnomah.*

CHRISTIAN LUCK,

Plaintiff,

vs.

OTIS ELEVATOR COMPANY, a corporation,
Defendant.

KNOW ALL MEN BY THESE PRESENTS,
That the Otis Elevator Company, a corporation, duly organized and existing under the laws of the State of New Jersey, and having an office and place of business in the City of Portland, Multnomah County, Oregon, as principal, and the National Surety Com-

pany of New York, a corporation, organized and existing under and by virtue of the laws of the State of New York, having an office and place of business in the City of Portland, Oregon, as Surety, are holden and stand firmly bound unto Christian Luck, the plaintiff above named in the penal sum of Nine Hundred (\$900.00) Dollars for the payment whereof well and truly to be made unto the said Christian Luck, his heirs, representatives and assigns, we bind ourselves, our successors and assigns, jointly and firmly by these presents.

Upon the condition, nevertheless, that whereas, the said Otis Elevator Company, the defendant above named, has filed its petition in the Circuit Court of the State of Oregon for the County of Multnomah for the removal of a certain cause therein pending wherein the said Christian Luck is plaintiff and the said Otis Elevator Company is defendant, to the Circuit Court of the United States for the District of Oregon.

Now, if the said Otis Elevator Company shall enter into said Circuit Court of the United States for the District of Oregon on the first day of its next regular session a copy of the record in said action, and shall well and truly pay all costs that may be made by said Circuit Court of the United States, if said Circuit Court shall hold that said action was wrongfully or improperly removed thereto, then this bond shall be void, otherwise it shall remain in full force and virtue.

In witness whereof, the said Otis Elevator Com-

pany and the said National Surety Company of New York have caused these presents to be executed and their corporate names to be hereunto subscribed, by their duly authorized officers, this nineteenth day of May, A. D., 1911.

OTIS ELEVATOR COMPANY,

By R. S. Shepard,

Principal.

NATIONAL SURETY COMPANY OF NEW
YORK,

By Jas. McL. Wood, its Atty, in Fact. Surety.
(Corporate Seal.)

Approved:

C. U. GANTENBEIN,

Judge.

[Endorsed]: Filed May 19, 1911.

F. S. FIELDS,

Clerk.

By A. L. Buchtel,

Deputy.

[Order of Removal.]

BE IT REMEMBERED, That at a regular term of the Circuit Court of the State of Oregon, for the County of Multnomah, begun and held at the County Court House in the City of Portland, in said County and State on **Monday**, the 1st day of May, A. D., 1911, the same being the **FIRST MONDAY** in said month, and the time fixed by law for holding a regular term of said Court.

Present, Hons. John P. Kavanaugh, Robert G.

Morrow, Henry E. McGinn, C. U. Gantenbein and William N. Gatens, Judges.

WHEREUPON, on this Monday the 22nd day of May, A. D., 1911, the same being the 19th Judicial day of said term of said Court, among other proceedings the following was had, to-wit:

*In the Circuit Court of the State of Oregon for the
County of Multnomah.*

Order Dep. 4 B. 9389.

CHRISTIAN LUCK, Plaintiff,
vs.

OTIS ELEVATOR COMPANY, a corporation,
Defendant.

At this time comes the defendant by its Attorneys, Griffith & Leiter and F. J. Lonergan, and having heretofore and within the time provided by law, filed its petition for the removal of the above entitled action from the Circuit Court of the State of Oregon to the Circuit Court of the United States for the District of Oregon, which petition sets forth the reasons for said removal, to-wit: that the parties hereto are residents and citizens of different States, and that the sum in controversy exclusive of interest and costs, exceeds the sum of two thousand dollars, to-wit: the sum of twenty thousand dollars, and said petitioner having presented and filed its bond in the sum of nine hundred (\$900.00) dollars, with good and sufficient surety pursuant to statute and conditioned according to law, and notice to plaintiff of this application having been given, the plaintiff appearing by his attorney, Honorable C. W. Fulton, and the defendant ap-

pearing by its attorneys, Griffith & Leiter and F. J. Loneragan, and

It appearing to this Court that said bond and petition are sufficient to authorize the removal of said action to the Circuit Court of the United States for the District of Oregon.

Now, therefore, it is hereby considered, ordered and adjudged that this Court proceed no further in this action and that the same be, and is hereby transferred to the Circuit Court of the United States for the District of Oregon, and that The Clerk of this Court prepare a full and complete copy of the record in this Court in the above entitled action and certify to the said papers as a copy of said record and forward the same to the Clerk of the Circuit Court of the United States for the District of Oregon at Portland in the County of Multnomah, State of Oregon.

C. U. GANTENBEIN,

Judge.

Dated May 19 1911.

[Certificate to Transcript on Removal.]

*In the Circuit Court of the State of Oregon for the
County of Multnomah.*

STATE OF OREGON,

County of Multnomah—ss.

I, F. S. Fields, County Clerk and ex-Officio Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, do hereby certify that the foregoing copies of pleadings, papers, orders and journal entries constituting all of the proceedings in the case of Christian Luck, Plaintiff vs. Otis Elevator

Company, Defendant, have been by me compared with the originals thereof, and that they are true and correct transcripts of such original pleadings, papers, orders, journal entries as the same appear of record and on file at my office and in my custody.

In witness whereof, I have hereunto set my hand and affixed the seal of said Circuit Court the 19th day of June, 1911.

F. S. FIELDS,
Clerk.

(Seal.) By R. A. Reid,
Deputy.

And afterwards, to-wit, on the 25 day of July, 1911, there was duly filed in said Court, an Answer in words and figures as follows, to-wit:

[Answer.]

*In the Circuit Court of the United States for the
District of Oregon.*

CHRISTIAN LUCK, Plaintiff,
vs.

OTIS ELEVATOR COMPANY, a corporation,
Defendant.

Comes now the defendant above named and for its answer to plaintiff's complaint.

Admits the allegations contained in paragraph 1 of said complaint.

Denies each and every allegation contained in paragraph II of said complaint except that defendant admits that on said twenty-fourth day of February, 1910, said plaintiff was in the employment of defendant as a foreman in charge of the installation of an

elevator in a building on West Park and Morrison Streets in the City of Portland, Oregon.

Denies each and every allegation contained in paragraph III of said complaint.

Denies each and every allegation contained in paragraph IV of said complaint except that defendant admits that on February twenty-fourth, 1910, a bucket fell down and upon plaintiff while in said elevator well.

Denies each and every allegation contained in paragraphs V and VI of said complaint.

Defendant for a first, further and separate answer and defense to said complaint alleges the following facts to-wit:

I.

That on said twenty-fourth day of February, 1910, said plaintiff was in the employ of defendant in the capacity of foreman and on said date was engaged in the construction and installation of an elevator in the building on West Park and Morrison Streets now occupied by Olds, Wortman and King; that said plaintiff as foreman was in charge of the men performing said work and also had charge of and supervision over the tools, instrumentalities and appliances used in the performance of said work; that it was a part of plaintiff's duty as foreman to inspect said instrumentalities and appliances used in the performance of said work and to see that the same were in good condition and repair and safe and suitable for the doing of said work.

II.

That defendant provided and had on hand a large and sufficient stock of hooks and other devices suitable for and properly used in fastening buckets of the character described in said complaint to a cable so that the same could be safely lowered into a well such as mentioned in the complaint; that plaintiff had the right and it was his duty to select from said stock of hooks and other devices such a hook as could be used with reasonable safety for the purpose mentioned in said complaint and acting in pursuance to his duty in that respect plaintiff did voluntarily select the hook which was used at the time of said accident in fastening said bucket to said cable and said hook in said complaint complained of so selected by said plaintiff was used at the time of said accident in fastening said bucket to said cable.

III.

That on the twenty-fourth day of February, 1910, plaintiff descended into said well which was about thirty (30) feet deep, and while in said well said plaintiff directed the men working under him to send down to him a sledge hammer which was done by means of placing the same in the bucket referred to in said complaint and fastened to a cable by means of said hook so selected by said plaintiff. That in descending down into said well said bucket in some way became unfastened from said hook so that the bucket fell down and upon said plaintiff. That if said hook so selected by plaintiff was a defective or improper appliance plaintiff was himself negligent in carelessly

and negligently selecting and using or permitting to be used such unsuitable or unsafe hook or appliance and that plaintiff's injuries, if any received, were occasioned solely by reason of plaintiff's own negligence and without any fault or negligence on the part of this defendant.

Defendant for a second, further and separate answer and defense to said complaint alleges the following facts, to-wit:

I.

That on the twenty-fourth day of February, 1910, plaintiff was in defendant's employ as foreman engaged in the construction and installation of an elevator in the Olds, Wortman and King building in Portland, Oregon; that on said date plaintiff descended into the well of said elevator for the purpose of plumbing the casing of said well which was about thirty (30) feet deep; that while said plaintiff was down in said well hole he directed the workmen engaged with him in the performance of said work and over whom he had control and supervision, to send down to him a sledge hammer needed by plaintiff in the doing of said work; that in response to said order from plaintiff said fellow servants of plaintiff placed said sledge hammer in a bucket containing more or less earth and by means of said bucket attached to a cable by means of a hook, sent said sledge hammer down to plaintiff; that said fellow servants of plaintiff so carelessly and negligently attached said bucket to said cable by means of a hook that said bucket in descending down said well struck a part of the cas-

ing thereof and thereby became unfastened from said cable and fell down and upon the plaintiff; that plaintiff's injuries were received by reason of the carelessness and negligence of his fellow servants in fastening said bucket to said cable without wiring said hook so that the bucket could not come off and without any fault or negligence on the part of this defendant.

Defendant for a third, further and separate answer and defense to said complaint alleges the following facts, to-wit:

I.

That on the twenty-fourth day of February, 1910, plaintiff was in defendant's employ in the capacity of foreman and on said date and for some time prior thereto said plaintiff was engaged in the construction and installation of an elevator in the Olds. Wortman and King building in Portland, Oregon; that said plaintiff as foreman had charge of and supervision and control over the instrumentalities and appliances used in the performance of said work, which tools and instrumentalities were chosen and selected by said plaintiff; that on said date and for some time prior thereto said plaintiff was thoroughly familiar with and knew the kind of hooks used in fastening the bucket described in said complaint to the cable by means of which said bucket was lowered into said elevator well and plaintiff then and there well knew and fully understood that said bucket so fastened by means of said hook to said cable would swing from side to side and strike the sides of said well and any

part of the casing thereof extending upward from the bottom of said well, and well knew and fully understood the likelihood of said bucket in so swinging and striking to be thrown off and separated from said cable, and said plaintiff at said time and place well knew and thoroughly understood and appreciated the hazards and dangers of working in said well while said bucket so fastened to said cable by means of said hook and filled or partly filled with earth and gravel was being lowered down into said well.

II.

That notwithstanding such knowledge, understanding and appreciation on the part of plaintiff, plaintiff on said date undertook to and did work down in the bottom of said well while said bucket so fastened and filled was being lowered therein without any remonstrance or complaint to this defendant or any one representing it; that the hook or device fastening said bucket to said cable was unsuitable or unsafe or insecure or that said bucket was dangerous or improperly fastened or liable to become disconnected and fall while being lowered into said well and plaintiff then and there and thereby and by reason of the premises assumed any and all risk of injury to him on account of said appliances or any thereof and of working in said well with the said appliances which were chosen and selected by plaintiff.

WHEREFORE, defendant demands judgment for its costs and disbursements herein.

GRIFFITH & LEITER and F. J. LONERGAN,
Attorneys for Defendant.

STATE OF OREGON,

County of Multnomah—ss.

I, A. J. McComb, being first duly sworn, depose and say that I am the selling agent of the Otis Elevator Company, defendant in the above entitled action, and that the foregoing answer is true as I verily believe.

A. J. McCOMB.

Subscribed and sworn to before me this 24th day of July, 1911.

F. J. LONERGAN,
Notary Public for Oregon.

[Endorsed]: Answer, filed July 25, 1911.

G. H. Marsh,
Clerk.

And afterwards, to-wit, on the 7 day of August, 1911, there was duly filed in said Court, a Reply in words and figures as follows, to-wit:

[Reply.]

*In the Circuit Court of the United States for the
District of Oregon.*

CHRISTIAN LUCK, Plaintiff,

vs.

OTIS ELEVATOR COMPANY, a corporation,
Defendant.

Comes now the plaintiff in the above entitled cause and for reply to the answer of the defendant therein, admits, denies and alleges as follows:

I.

Replying to the first further and separate answer and defense in said answer alleged, this plaintiff denies the same and each and every allegation therein contained and the whole thereof, except that this plaintiff admits that the said defendant was on the 24th day of February, 1910, engaged in the construction and installation of an elevator in the building occupied by Olds, Wortman and King, and that this plaintiff was in the employ of the said defendant as in the complaint in this cause alleged and not otherwise, and this plaintiff also admits that on said 24th day of February, 1910, he descended into the said well and the said bucket became unfastened from said hook and fell down upon him, as in the complaint in this action it is alleged and under the circumstances and conditions as in said complaint alleged and not otherwise.

II.

Replying to the second further and separate answer and defense in said answer alleged, this plaintiff denies the same and each and every allegation therein contained and the whole thereof, except that plaintiff admits that the defendant was on the 24th day of February, 1910, engaged in installing an elevator in the Olds, Wortman and King building, and that plaintiff was in the employ of the defendant as in the complaint in this action alleged and set forth and not otherwise, and plaintiff admits also that he was on said day down in the well and that the said bucket became unfastened from said cable and fell

down upon him as described in said complaint under the circumstances and in the manner in the complaint described and not otherwise.

III.

Replying to the third further and separate answer and defense in said answer alleged, this plaintiff denies the same and each and every allegation therein contained and the whole thereof.

WHEREFORE, This plaintiff, having fully replied to the said answer, demands judgment as in his complaint demanded.

C. W. FULTON,
Attorney for Plaintiff.

STATE OF OREGON,

County of Multnomah—ss.

I, Christian Luck, being first duly sworn, deposes and say, that I am the plaintiff in the above entitled action and that the above and foregoing reply is true as I verily believe.

CHRISTIAN LUCK,

Subscribed and sworn to before me this 7th day of August, 1911.

(Seal.)

HARRY L. RAFFETY,
Notary Public for the State of Oregon.

[Endorsed]: Reply, Filed August 7, 1911.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on the 13 day of March, 1912, the same being the 9 Judicial day of the Regular March, 1912, Term of the District Court, District of Oregon, present: the Honorable R. S. BEAN,

United States District Judge presiding, the following proceedings were had in said cause, to-wit:

**[Minutes of Trial—Motion for Directed Verdict
Denied.]**

*In the District Court of the United States for the
District of Oregon.*

CHRISTIAN LUCK,

No. 3815

vs.

OTIS ELEVATOR COMPANY, March 14, 1912

This cause came on regularly at this time for further trial pursuant to adjournment: jury and attorneys present as heretofore and thereupon J. H. Eliau, Geo. Hyde, H. A. Taylor, Lizzie Luck, were sworn and examined as witnesses for plaintiff and thereupon plaintiff rests and thereupon R. W. Greene, Paul Ravoe, J. J. Erickson, R. Bristoe and R. S. Shepard were sworn and examined on behalf of defendants and thereupon defendant rests and thereupon C. Lock and J. H. Eliau were recalled and examined in rebuttal and thereupon defendant moved for a directed verdict in favor of the defendant and thereupon after argument of counsel motion ordered submitted and by the Court taken under advisement and thereupon after due consideration it is Ordered that said motion be and hereby is denied and thereupon the hour of adjournment having arrived it is Ordered that this cause be and hereby is continued for further trial until Friday, March 15, 1912, at 10 A. M. and jury empaneled in cause on trial excused until March 15, 1912, at 10 A. M.

And afterwards, to-wit, on the 15 day of March, 1912, the same being the 13 Judicial day of the Regular March, 1912, Term of said Court; present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Judgment Entry.]

*In the District Court of the United States for the
District of Oregon.*

CHRISTIAN LUCK

No. 3815

vs.

OTIS ELEVATOR COMPANY March 15, 1912.

This cause came on regularly at this time for further trial pursuant to adjournment; jury and Attorneys present as before and thereupon after argument of counsel for respective parties and instructions of the Court cause submitted to the jury and the jury retired to consider of their verdict and thereupon the jury having agreed upon their verdict were brought into court and returned into court their verdict as follows: "We, the jury in the above entitled cause find for the plaintiff and against the defendant and assess the damages of the plaintiff at \$7000.00 Henry A. Oleman, Foreman" which said verdict is received by the Court and ordered filed and thereupon it is Ordered that the plaintiff Christian Luck have and recover of and from the defendant Otis Elevator Company, a corporation, the sum of Seven Thousand (\$7000.00) Dollars and his costs and disbursements herein taxed at \$

And afterwards, to-wit, on the 15 day of March, 1912,
there was duly filed in said Court, a Verdict in
words and figures as follows to-wit:

[Verdict.]

*In the District Court of the United States for the
District of Oregon.*

CHRISTIAN LUCK, Plaintiff,

vs.

OTIS ELEVATOR COMPANY, a corporation,
Defendant.

We, the jury in the above entitled action find for
the plaintiff and against the defendant and assess the
damages of the plaintiff at \$7000.00. Foreman.

HENRY A. OLEMAN.

[Endorsed]: Filed March 15, 1912.

A. M. CANNON,

..Clerk.

By F. H. Drake,

Deputy.

Aid afterwards, to-wit, on the 13 day of May, 1912,
there was duly filed in said Court, a Bill of Excep-
tions in words and figures as follows, to-wit:

[Bill of Exceptions.]

*In the District Court of the United States for the
District of Oregon.*

CHRISTIAN LUCK, Plaintiff,

vs.

OTIS ELEVATOR COMPANY,
Defendant.

BE IT REMEMBERED, That this cause came on for trial in the above entitled Court on the thirteenth day of March, 1912, before the Honorable R. S. Bean, District Judge, presiding. Plaintiff appearing in person and by C. W. Fulton, of Counsel, and defendant appearing by Griffith & Leiter and F. J. Lonergan, of Counsel, and thereupon, a jury of twelve men having been duly called, empaneled and sworn to try said cause, Christian Luck was called as a witness on behalf of himself, and being first duly sworn, testified as follows:

TESTIMONY OF CHRISTIAN LUCK.

That he is the plaintiff in this case, and in February, 1910, was in the employ of defendant as a mechanic, there being one mechanic to a helper. His duties were to perform his share of the work outlined by Shepard, Superintendent for defendant. They were digging wells for plunger elevators for Olds, Wortman and King building, in Portland, Multnomah County, Oregon. The hole was below the basement, and had to extend as far beneath the basement as the elevator went above the basement floor. The hole was approximately eighty-six feet deep. Inside the hole sheet iron casing had to be installed, one-sixteenth of an inch in diameter. This casing was put in in sections, approximately twelve feet to a section. The sections are only three feet long, but they were driven together on the top to get a length of about twelve feet, so as not to have to put a section on every two or three feet. The casing is set perfectly plumb,

and then the hole around the casing is filled with material dug out of the hole, such as cement gravel, clay and some sand.

At the time of the accident the well hole had been filled up to about thirty feet from the top, and the casing extended about thirteen feet above the level of the fill in the hole. The well hole was three feet in diameter one way and three feet six the other.

The material used to fill the well hole was let down into it by means of a square bottomless bucket, that is,—the bottom could be removed in order to dump the material from it, there being not room enough to tip the bucket. This bucket was operated by an electric hoist, with a three-eighths plow steel cable. The steel cable was connected with the bucket by means of a hook made out of an iron bolt one-half inch in thickness. The hook used on the day of the accident was just about the shape of the model handed the witness. (Plaintiff's Exhibit "3".) (

The bucket when filled with cement gravel, as it was at the time of the accident, weighed between 450 and 500 pounds.

"Well, about 12 o'clock—oh, five minutes to 12, they got through filling, and had this section filled up to the top; it was ready for another section of casing—the casing which was practically 12 feet long. Well, the first thing after dinner, we put on another section of casing, taking a sledge hammer and blocks and driving it together and put the plumb line through, and put the cover on and braced it and we had all this done and the tools lying in the bottom of the well, the

sledge hammer and whatever we used to put this casing in. So we took these tools and moved them over to one corner and told them to send down a bucket of dirt. They sent down a bucket of dirt. The idea of sending this bucket of dirt down there was to dump the dirt and then take the tools and take them up on top."

They had all the tools in the hole and the casing in and the bucket was being lowered so that when the cement gravel was dumped the tools could be put into the bucket and hoisted up. Luck was in the bottom intending to put the tools in the bucket. The bucket came down and he heard a funny noise, as if the bucket hit something, and all at once the bucket fell and struck him in the middle of the back, knocking him down and rolling him up in a ball. Luck couldn't get out from under the bucket; it was too heavy for him to handle. Two men took the bucket off him and dumped the bucket, and hoisted him out of the hole. Jack Elia was in the well, standing with one foot on the casing and one foot on the ladder. At about the top of the casing, twelve feet above Luck, Elia and another man helped remove the bucket, which was too heavy for plaintiff to handle.

Was in good healthy condition prior to the accident. Bucket struck him in the middle of the back. Since the accident has been unable to do any work, bend over and practically unable to do anything. There is a lump on his back where the bucket struck him. Shows the lump to the jury. The lump made its appearance right after the accident. Did not have

it before the accident. Dr. Bettman treated him the evening of the injury and frequently examined him since the injury. Dr. Walker examined him and took an X-Ray photograph of his back three weeks before the trial.

Thereupon the plaintiff was excused temporarily.

RALPH C. WALKER, being called and sworn, testified as follows, on direct examination:

Is a physician and surgeon of eight years' experience, graduated from University of Oregon, and with a year's experience in Berlin. His specialty is taking X-Ray photographs of the human body.

On February twelfth, 1912, examined the plaintiff and took a photograph, for the purpose of discovering the nature or character of any defect in his back or spine.

"I simply examined to see whether or not there was any protuberance of any kind in the spine, and I found that this one portion in the neighborhood of the twelfth dorsal vertebra—the vertebra to which the ribs are attached—the spinal process in that neighborhood protruded, several of them; three, as I remember, rather prominent, but this one in particular."

There is a quite prominent lump on his back. The X-Ray photograph taken differs from ordinary photography.

"It is known as X-Ray-radiograph or shadowgraph, as it is sometimes called, because you depend upon the shadow cast by the X-Ray. For instance, you have your plate—in taking a picture of the hand, the hand would be placed on the plate in this manner;

the X-Ray tube, which is the source of light, is placed above it, and is centered over the point which you wish to get; for instance, if there happens to be a broken bone here suspected, we center over the bone and your tube is placed at an average distance of 20 inches, and in that way the shadow is cast on your plate here; the flesh being more or less transparent, and the shadow of the bone is cast here on your plate; and then it is developed in the ordinary way, with the ordinary negative and dried."

This gives a shadow of the bones, and more or less a shadow of the flesh, depending upon the part of the body, and truly represents the conditions of the bones, and their relation to each other, when centered properly over the part, which was done in taking this photograph.

"I found—in taking this picture, I took two views—one taken directly through his body with the patient lying on the plate, which would show whether there was any curvature or not up and down, in looking at the man in this direction or looking from the back in the same direction, and I found that the spine was straight that way; but in taking the view through the side. I found that the bodies of one of the vertebrae had been crushed and was wedge shaped, so that it would make the spine in a sort of triangle, and projecting at the bone where the lump is on his back."

The condition found was not a normal nor healthy condition.

"I will have to explain that two views were taken on this one plate, one-half the plate being covered

with lead, while the other half was being exposed, and then the lead shifted to this side, covering the part that was exposed, and covering the part—you can see the line here where it was lapped over. In this part it shows the view of the spine taken through with the plate placed here at the back, and you can see the ribs coming off from either side here. This light streak down through the center is the spinal column, the vertebrae rather, and you can see the outline of the different vertebrae. These dark lines between represent the cartilage that is placed in between the bones and acts as a cushion. This is the twelfth rib, or last or floating rib, as it is termed. When you have this plate closer, you can examine and you will notice that the line through here is not quite as distinct as it is there, either below or above.

This shows that—I will have to show it on this side here, which is a side view, and you can see the rib, the light streak coming down this way. This is the vertebrae here, and in this place back here is where the spinal column or nerves come down. Now, this is the vertebrae that has been injured. Can you all see that plainly? Now if you will notice this vertebrae above—I am drawing the outline of that with my pencil—that is square. You take the one below here—it is square, but you take this one, you see it is wedge shaped, showing there has been a crushing in here, or what is termed a compression fracture of this body of the vertebrae. That could happen without having any pressure on the spinal cord here, just the same as you could crack a nut without breaking the

kernel. The reason now this doesn't show so plainly here as the one below or above, is the fact that the light coming through this way, you see part of the body of this vertebrae, and in this one below the light comes straight through and this one above, it comes a little straighter, and you also see that by this vertebrae being wedge shaped, or compressed, the outline of the spine is changed, so that you have more or less of a triangular condition, and this being the edge of the back, the spinous process which comes out like that would be prominent. This one above slightly so, the one below slightly so, the others would be practically in a normal condition."

The X-Ray plate was introduced in evidence, and marked Plaintiff's Exhibit "1".

Whereupon, Counsel for plaintiff asked the witness to take Gray's Anatomy and point out some of the pictures representing the spinal column and vertebrae in a normal, healthy condition. To which Counsel for defendant objected as being incompetent, irrelevant and immaterial. Whereupon, the Court ruled that the witness could use said picture to illustrate. To which ruling Counsel for defendant then and there excepted, which exception was allowed.

Whereupon, said witness testified as follows:

"This is an illustration of the dorsal vertebrae, or the vertebrae to which the ribs are attached. This is the twelfth, which is the one which has been injured. Now, this is the body of the vertebrae here, and here is the spinous process that extends up the back, that you feel when you feel a man's back. You don't feel

the body of the vertebrae, because that is in front, on the inside. The rib is attached here, and goes around toward the front. Now, the spinal column lies right in there. I illustrate with my pencil, between the spinous process and the body of the vertebrae. Here is one here showing the lumbar vertebrae, which will illustrate the point. This is one of these vertebrae showing the body here looking down on it from the top; here is your spinous process here. Here is the opening through which the spinal column itself passes."

The vertebrae of plaintiff's back has been smashed so that this portion here is shorter than the back, (indicating by pencil on the picture, the extent to which the twelfth vertebrae in plaintiff's back deviates from the normal condition.)

Whereupon the said picture mentioned by the witness and used by the witness as an illustration was offered and received in evidence and marked plaintiff's Exhibit "2" but neither the book itself nor any other portion thereof was received in evidence.

Whereupon, the witness further testified:

"Q. What is the effect of that condition on the individual—on the plaintiff?

A. Well, at the beginning there may be very little effect, and very often these compression fractures are overlooked because in the condition of the spine when a man examines—a physician examines the patient, he always looks for either what we call motor or sensory disturbances; that is, a man will lose either motion or sensation on account of pressure on the

spine, and before the advent of the X-Ray, these conditions were not recognized, and since the X-Ray, in making picture here, we show these conditions do exist, and show these fractures of the spinal column—or the spine itself, do exist without being very much pressure, if any pressure on the spinal column, or spinal cord, as it is termed. Now, with this at the beginning there might not be much of any symptom, that is, might not have any tickling sensation or numbness, or lose any motion, but later on, when the bone callous forms there, as it does when any bone is broken, and nature sends out this bone callous to repair, it enlarges and throws out an excess amount; like a piece of iron that is welded together; and this may press on the spinal cord and cause more or less symptoms, perhaps pain or tickling sensation, or something of that kind.

Q. How will it affect him as to physical labor—lifting?

A. Well, as to physical labor, the bodies of the vertebrae take more or less of the weight, the greater proportion of the weight, and, as we term it, it is the back bone to which the muscles are attached, and it must be more or less rigid, and when one of these is outside like it is here—partially outside, it changes your line, and you have a triangular instead of a straight line, which is weaker; will make his back very much weaker in his labors.

Q. State what the fact is as to such an injury being permanent?

A. It is permanent, because you can't repair that

amount of bone that has been compressed. It will always remain in that position, that wedge shaped.

Q. He will never recover from it?

A. No sir.

Q. Will he be able to do hard—to apply himself to hard physical labor, which involves stooping over and lifting hereafter?

A. I should say not.

Q. Could you form an opinion as to what caused the condition which you found from this examination of the plaintiff's back?

A. It must have been caused by a force applied in such a manner as to either double the patient forward so as to bring these vertebrae together and crush it, or by a blow of some kind, so as to drive them together.

Q. You heard the plaintiff describing in court here a few moments ago, when he was on the witness stand, about this bucket filled with cement gravel, falling the distance that he described and striking him in the back?

A. Yes sir.

Q. Might such a blow as he there described as having received, produced the condition that you found in his back?

A. It would, yes."

On cross-examination, said witness testified as follows:

The first photograph was taken through from the anterior to the posterior, and showed the vertebrae to be straight. The second photograph was taken

from the side and shows a disturbance of practically one vertebrae there being a slight disturbance of the first lumbar vertebrae which is the next one below, the upper surface of which has been crushed a trifle. There was a compression fracture due to the driving together of these vertebrae. The vertebrae was squeezed down so that the body thereof in looking at it sideways is triangular in shape instead of being approximately square. The vertebrae was not driven into the next one so as to become fastened to it. There is cartilage between the bodies of the vertebrae and they have been pressed together and the remnants absorbed by nature. In putting your hand on plaintiff's back at the point of the injury the lump felt is really the spinous process and not any foreign growth. It is simply the spinous process rendered more prominent by the bending of the spinal column. There is nothing in the picture to indicate that any pressure exists. The sensation of tickling or other nervous sensations are due to pressure, and the outline of the spine without pressure would not produce any of these symptoms. The photograph was taken on February twelfth, 1912, at the request of the plaintiff to enable the witness to testify on the trial.

On re-direct examination the witness testified as follows:

"Q. Is the injury you have described near any important nerve centers?

A. The spinal cord passes down through the holes in the vertebrae, which I illustrated to the jury, and this is right next to it. The bad vertebrae is right

here and your cord passes right down behind it, and any change in position is liable to cause pressure.

Q. Is that liable to get worse as it goes on? To affect the nerve centers?

A. Yes, as a rule when the callous is thrown out in the first place, in Nature's endeavor to repair this condition, then there is pressure more or less on this spinal column or cord rather, and pressure on any nerve if continued will produce a condition of inflammation of the nerve or neuritis. Later on Nature absorbs more or less of this callous; in the length of time in this case, two years, there has been considerable of that callous absorbed, if not all that is going to be absorbed. A condition of neuritis when not treated, and sometimes when treated, continues progressive, and gets worse in time.

Q. Will you explain to us laymen what is meant by neuritis, and just what it is?

A. Neuritis is simply inflammation of the nerves.

Q. How does it act—the effect on the patient?

A. Causes pain; there is more or less pain, there is pressure on the nerve. Nerves are like wire, with covering or insulation, and the nerve derives its nourishment from this covering; the blood vessels come down through and it acts as a protection on the nerve. When you put pressure on this nerve or nerve covering, it shuts off the food supply of this nerve, and that causes pain, causes the nerve to shrink and interferes with its function.

Q. Ultimately what does it result in?

A. Ultimately if continued, the nerve might in

time—its function might be destroyed entirely or only partially.

Q. Produce paralysis in any respect, local or otherwise?

A. Yes, produces paralysis.

Q. That you say is the result that may come from the injury he suffers from still?

A. Yes sir.

On re-cross examination, the witness testified:

Q. Do you mean to say, Doctor, now, that Mr. Luck is suffering from neuritis of any sort?

A. I have not examined him for neuritis, but simply he has complained of pain and he may have this neuritis condition due to pressure. I don't say that he has, because I haven't examined him for that.

Dr. A. G. Bettman testified for plaintiff, as follows:

Is a physician and surgeon of five years' experience, graduating from the Medical Department of the University of Oregon. Called in to treat the plaintiff on February twenty-fourth, 1910, at which time he was suffering pain in the back, and there was tenderness over the back and over the muscles of the back on either side of the spinal column. Has seen him several times since.

On the first examination there was discoloration, but no lump. Noticed the lump on the third examination about a year ago. Has examined the X-Ray photograph.

“Q. What in your judgment, will be the effect of that injury on him? On his general health and ability to work during the rest of his life?

A. It will weaken his back and I don't see any—
how it can be improved any.

Q. You think it is permanent?

A. Yes sir.

Q. Is it likely to become more aggravated?

A. Why yes, I should say it is very likely to.

Q. How will it affect any nerve centers, or nerves
of the body?

To which question counsel for defendant objected
as being immaterial, incompetent and irrelevant and
not pleaded in the complaint, which objection was
overruled, to which ruling defendant then and there
excepted, which exception was allowed, and said wit-
ness further testified as follows:

“A. Well, pressure would affect the cord. At
present there seems to be no pressure on the cord.”

“Q. May that come in the future?”

A. It may come later, yes. I should say that the
angulation of his back was greater than it was the
first time I saw him.

Q. What?

A. Is much greater than the first time I saw him

Q. The angulation?

A. Yes.

Q. By that you mean being out—

A. Out of a straight line.

Q. Out of a straight line?

A. Yes.

Q. More curved or bent?

A. Yes.

Q. It is worse now than it was when you first saw

him?

A. Yes sir.

Q. That would indicate that the abnormal condition is advancing or increasing?

A. Yes."

On cross-examination, the witness testified that he saw the plaintiff on February 24th. and 26th., 1910, at which times he was in bed. Did not see the plaintiff again until something like a year afterwards at his office, where Luck called. Did not treat him at that time, but plaintiff called to talk over his condition. Does not remember if this was after the suit was instituted or whether the matter of the suit was discussed. Examined his back at that time. Did not consider that there was anything much that could be done at that time. Saw him several times between that visit and February, 1912. Thinks something was said at the next meeting of the suit. The only two times when he undertook to prescribe as a physician were on February 24th and 26th., 1910, at which times there was no angulation.

Examined him the last time a few days before the X-Ray photograph was taken. Is of the opinion that there is no pressure on the spinal cord. There is no treatment known in the profession that would relieve the situation.

Christian Luck being re-called, further testified that he went to work on this job the day after Thanksgiving, the job having been started two or three days before, and some of the timbers having been set up. Had nothing to do with the selection or looking after

the machinery used in carrying the dirt into, and the bucket out of, the well. The hook used at the time of the accident was the only one he ever saw there and had been delivered there when he went there, already connected up with the cable. Had nothing to do with the selection of this hook or the machinery or cable or bucket or any of the apparatus. That was done by Shepard, the Superintendent. Was not foreman on the job. Did not have his attention called to this particular hook or its liability to slip off. Had worked for defendant off and on for four years constructing electric elevators, in which work they did not dig wells and use this pocket and hook. Two plunger elevators had been put in before this for the Y. W. C. A. and the Y. M. C. A. buildings. Had worked on the Y. M. C. A. job about two weeks. Did not see how the hook happened to come off of the bucket. When it fell was shoving the tools to one place so as to have a place to dump the bucket. Is thirty years old. At the time of the accident was earning $37\frac{1}{2}$ c an hour, or \$3.50 a day, \$21.00 a week, with overtime in addition. Health in good condition before the accident and was considered a strong able-bodied man. Never suffered from any sickness nor subject to attacks of sickness before and never had any trouble with his back. Now has a pain in his back practically all the time, being unable to work or any manual labor where he has to stoop. His regular work required him to stoop and lift constantly. Unable to do that kind of work since the accident. Had to work in the well just the same as anybody else. Did everything

that he was told to do and what he saw had to be done, including digging. Had to be in the well that day in the discharge of his duty.

On cross-examination, Christian Luck testified as follows:

The accident happened about one o'clock. Resumed work at 12:30. Had put the casing together and the accident happened about one o'clock.

At this point plaintiff introduced the hook, identified by the witness, which was marked Plaintiff's Exhibit "3".

The twelve foot section of the casing had been added on to the casing already installed and they were ready to go ahead with filling up the well preparatory to which he was about to send the tools up. The bucket was lowered into the well for the purpose of dumping the bucket full of dirt, then putting the bottom in and then taking the tools out. There was nothing in the bucket except the gravel. The sledge hammer which he was using was a sixteen pound hammer with a 22 inch handle. Knew the bucket was filled with cement gravel because he saw it after the accident when it had not yet been emptied. Told the man up above to send the bucket down so the tools could be sent up. The man on top of the casing then called to the man above to send the bucket down. Jack Elia, on top of the casing passed the word to Raveua, who signalled to the man operating the hoist, V. Bristow. Doesn't remember the exact words used, but nothing was said about a sledge hammer. Worked in the well as much as anybody, taking his turn the

same as anybody else. The bucket had a hinge on the bottom so the bottom could be swung out and the dirt released and there would be one man in the well to do this. Sometimes he would do it, sometimes someone else; it was arranged between them, changing in four hour shifts.

He started work on Thanksgiving, 1909, and worked constantly on the same job until he was hurt, but not on the same hole. Altogether there were seven holes, and he was injured on the second one. The first one had been finished, and the second one had been dug and the casing installed and the well filled to a point within thirty feet of the top. Worked on the day shift. At that time there was only one shift and only one hole being worked upon. Started on Thanksgiving, and had worked approximately seven weeks on the first hole. The same hook was used both for taking up the earth and for afterwards putting it back in, but a different kind of bucket was used to haul the earth out.

“Q. But the same hook to fasten the different kinds of buckets to the cable would be used, both in hauling it out and for lowering the buckets?

A. Yes sir.

Q. Well, you had seen that hook there, I suppose, had you not?

A. What is that?

Q. You had seen the hook there?

A. Have seen the hook?

Q. You had seen the hook, had you not?

A. Yes sir, the hook was used there all the time.

Q. Well, you had seen it used, I mean?

A. Well, we had used it there right along, yes.

Q. You had used it yourself, had you not?

A. Well, I guess I had.

Q. Well, don't you know whether you had or not?

A. I have put it on the bucket the same as anyone else.

Q. You have put it on the bucket?

A. Yes sir.

Q. The same as anyone else working there?

A. Yes sir.

Q. And in the doing of that work, it would be necessary to do that quite often, would it not?

A. Every bucket.

Q. Every bucket?

A. Yes sir.

Q. So that during the time you were working there, you knew what kind of hook it was, did you not?

A. I never knew what they called it.

Q. Never knew what they called it?

A. No sir, never seen a hook like that before.

Q. Did they have a hook like that on the Y. M. C. A. building?

A. Yes, we used that.

Q. Used the same kind of a hook on the Y. M. C. A. job?

A. The same hook.

Q. The same hook?

A. Yes.

Q. And you had worked on that job over there,

had you?

A. Yes sir, about ten days or two weeks, I think.

Q. And had used this same hook over there?

A. Yes sir.

The bail or handle of the bucket was 5-8 inches in diameter, and the bail of the bucket would be fastened onto the hook. Stated that the hook exhibited to him differed from the hook in use at the time of the accident. Had worked for defendant four years as a mechanic. The mechanic has one helper over whom he has control and supervision. Started in with a helper named Saling who was discharged by Shepard and then he generally worked with Elia. He was the only mechnic on the job.

“Q. And you had but one helper?

A. I practically didn't have any helper.

Q. I thought you said Elia was your helper?

A. Well, I considered him as my helper.

Q. Well, you had Revau. Whose helper was he?

A. They got their orders from Shepard. I didn't give them any.

Q. And you had Bristow.

A. He got his orders from Shepard.

Q. Did you have no right whatever over these men?

A. Shepard didn't come over and tell me anything they should do. He would tell them what to do, and if they didn't do as he told them, when he came back he would fire them.

Q. Suppose it became necessary, in the progress of the work that there should be some authority ex-

exercised, and Mr. Shepard was not there, who would exercise it?

A. Mr. Shepard would be there alright. He was there pretty frequently.

Q. Suppose he was not there? Did any such contingency ever arise?

A. Well, if the pump or anything like that went out of whack, I would fix it.

Q. Who would?

A. I would fix it. I was mechanic on the job. I had a right to do that. That was my part of the work.

Q. Was Mr. Shepard there at the time this accident happened?

A. No sir, but he was there I believe, about half past eleven—something like that—eleven o'clock.

Q. As a matter of fact, Mr. Luck, weren't you at that time general foreman on the job?

A. No sir.

Q. And weren't you performing the work there as general foreman?

A. No sir.

Q. And Mr. Shepard was the superintendent who had supervision and direction over all the different jobs being performed by the Otis Elevator Company?

A. Mr. Shepard, we call him superintendent and foreman at the same time.

Q. Well, Mr. Shepard was the man, was he not, who had charge or supervision over the construction work of all the jobs?

A. Mr. Shepard didn't tell me what the other men should do.

Q. No. Didn't he tell you what work should be done?

A. No, he would tell each man individually what he wanted him to do.

Q. Who kept the time of the men?

A. I did.

Q. Who turned in the time?

A. I did.

Q. To whom would you turn it in?

A. Turned it in to Mr. Shepard.

Q. Who made requisitions for materials that were needed on the job?

A. Well, I don't believe I ever made out any.

Q. Never made any at all?

A. I don't believe I have—unless we wanted some coal oil or something like that—gasoline.

Q. As a matter of fact, didn't you make requisitions on the shops for materials that were used on this job?

A. We didn't use any material from the shop on that job.

Q. How about the tools?

A. They were mine.

Q. How is that?

A. They were mine.

Q. The tools were yours?

A. Yes sir.

Q. How about appliances?

A. They were sent there.

Q. Did you never order any appliances of any sort to be used on this job?

A. No sir.

Q. Didn't you go down, or send down to the shop for different things to be sent up to the work?

A. The only thing we ever used on the job was gaskets, I believe.

Q. What do you mean by that?

A. Gaskets for the pumps—we used to blow them out pretty regular.

Q. Now, Mr. Luck, didn't you on January 25, 1910 order for this job, a clamp that was to be used for holding the well casing?

A. Used for holding the what?

Q. The well casing.

A. No sir, I never seen one there.

Q. And didn't you on the 14th day of February, order a spider for plumbing the well casing?

A. No sir, Mr. Shepard ordered that himself.

Q. And didn't you on the 18th day of February, 1910 order clamps for holding the steam and water pipes in the well hole?

A. I believe that we did get some clamps there. That pipe was getting some water on us one time. I forget when it was.

Q. Weren't those made according to your special directions?

A. No sir, they were already in stock, I believe.

Q. Weren't you foreman on the Y. M. C. A. job in digging the well hole there?

A. No sir.

Q. I hand you a piece of paper, and ask you if that is your signature underneath?

A. Yes sir.

Q. What is that?

A. This is a time sheet."

Whereupon defendant offered in evidence the time sheet identified by the witness and signed "C. N. Luck, Foreman," which was marked Defendant's Exhibit "A".

"Q. I will ask you if you ever read the directions on the other side?

A. No sir, I never had time."

Witness was handed another time sheet, the signature to which he could not identify positively, which was marked Defendant's Exhibit "B" for identification.

The witness identified other time sheets bearing his signature which were offered in evidence and marked Defendant's Exhibit "C".

"Q. Did you notice the word "foreman" there, when you were signing these time tickets?

A. No sir, I didn't notice in particular until just now.

Q. Never noticed that until today?

A. No sir."

Q. Did not make out tickets like that on the Y. M. C. A. job. Mr. Shepard kept the time on that job.

"Q. Did you ever hire or discharge any men?

A. No sir.

Q. Never had anything to do with that?

A. No sir.

Q. And you never selected any tools from the shops?

A. No sir. They were sent there by Mr. Shepard's directions. Whatever he wanted there was sent there.

Q. Whenever a tool got broken, who replaced it?

A. Why, the Otis Elevator Company replaced it.

Q. Why—who would ask for it?

A. That is, if it was their tools.

Q. Who would put an order in for it?

A. I wouldn't put no order in for any Otis Elevator tools that were broke.

Q. You wouldn't?

A. No sir, I would put an order in for my own, though that was broke.

Q. Do you know what a Crosby clip is?

A. Yes sir.

Q. Did you use one on this job?

A. Yes sir, we used that to hoist the pump up and down.

Q. Didn't use it when you were lowering this bucket into the well?

A. No sir, we don't use any on there.

Q. Didn't Mr. Shepard, some time before this accident happened, tell you to use a Crosby clip when you were lowering the bucket into the well?

A. No sir.

Q. Never told you any such thing?

A. No sir, you couldn't get no Crosby clip on the hook.

Q. You couldn't?

A. No sir.

Q. How about the cable?

A. Well, that was on there all the time.

Q. You mean the cable was on all the time?

A. Yes sir; those Crosby clips never were taken off.

Q. Well, couldn't you have used this cable on this particular bucket, and fastened the cable to the bucket by means of a Crosby clip?

A. No, sir. It wouldn't have been practicable.

Q. And if you had done that, the bucket couldn't possibly have fallen off?

A. We would have had to take this clip off every time we loaded the bucket.

Q. Every time what?

A. They loaded the bucket.

Q. Why?

A. Sometimes they would put the bucket on a wheelbarrow, and put the bucket on the dump and fill it, and then put the bucket on and hoist it, and lower it down to the well.

Q. And couldn't you have taken a piece of wire and wired the bail of the bucket to the hook?

A. Well, that was not practicable.

Q. You couldn't have done that either?

A. I simply say it aint practicable.

Q. Well, as a matter of fact, you considered the hook you were using as perfectly safe, didn't you?

A. Yes sir, I thought it was all right.

Q. You used it for several months there, did you not?

A. Yes sir.

Q. Used the same hook over on the Y. M. C. A. building?

A. Yes sir.

Q. And you used the same hook on the Olds, Wortman & King building?

A. Yes sir.

Q. Not only to haul buckets of earth out of the well, but also to lower them into the well?

A. Yes sir.

Q. And you had worked there continually during all that time, and saw the hook, and saw how it behaved, and you considered it safe and proper, did you not?

A. Well, I couldn't see how it behaved.

Q. Well, the bucket didn't fall on you did it?

A. Well, that don't say how it behaved.

Q. Well, if you had considered it an unsafe appliance, you would have remonstrated about it, wouldn't you?

A. You will have to read that over again.

Q. If you had considered it an unsafe hook, you would have kicked about it, wouldn't you?

A. I think I would.

Q. You had a right to do that, didn't you?

A. Yes sir.

Q. Did you ever complain about that to Mr. Shepard?

A. No sir.

Q. Or to anybody else?

A. Not that I know of.

Q. And you knew that if this prong wasn't high enough, if the bucket should happen to strike the casing or some other obstructions, the bail might slip out, might it not?

A. I guess it might. That is what it done this time.

Q. Sure, and you knew that, didn't you?

A. Never stopped to consider that.

Q. You don't have to be a mechanic to know that, do you?

A. Got to be better than a mechanic to decide that.

Q. How?

A. You would have to be better than a mechanic to.

Q. Wouldn't anybody, Mr. Luck, know that if this hook was of the character described by you, that the slightest knock on the bottom of the bucket so as to release—so as to put any slack there, would cause the bail of the bucket to slip out of that hook?

A. Well, I look at it this way: Mr. Shepard had that hook made, and that was the hook that was going to be used there, and I thought he knew everything about it—that the hook was safe.

Q. But you also knew enough about it to know the character of work that was being done there, didn't you?

A. I knew the character of work that was being done.

Q. And you knew the likelihood of the bucket striking against the side of the well, or against the

bail, didn't you?

A. Well, some times it does it.

Q. That wasn't an unusual occurrence was it, Mr. Luck?

A. Oh, no, it would scratch. Sometimes you would have some trouble with it striking some places, owing to how close that casing comes out to the center of the hole. Sometimes there wouldn't be hardly room enough to get the bucket through.

Q. And the bail of the bucket was about five-eighths inches in diameter, wasn't it?

A. About, yes.

Q. And it was of iron or steel, wasn't it?

A. It was of iron.

Q. Of iron. So that there would be no give to it, would there?

A. The only time there would be any give to it would be when it would strike something.

Q. When it would strike something, there might be some play in it.

A. Yes sir, the load in it was liable to draw the sides together—a heavy load like that.

Q. And in doing that, the blow might be enough to jump out of this hook?

A. No sir, I don't think so.

Q. Well, it must have been, because as you say, it did it on this occasion?

A. Well, it hit then."

Went back to work about two weeks after the accident, and worked until the job was finished, which was four months anyway, maybe a little more than

that. Was appointed foreman when he went back to work after the injury. Received \$3.50 per day before the accident happened, and a little while after the accident his wages were raised to \$4.00. After the accident signed the same kind of time tickets as before. After the accident three shifts were run, and he was in charge of all three, but at the time of the accident Mr. Shepard was the "head squeeze", and he was only a workingman. When the Olds, Wortman & King job was finished went with a helper to a job on Union Avenue and Davis Street. Requested help from Mr. Shepard because one man could not do all the lifting. Shepard said, "Why, what's the matter?" I said, "I can't do nothing." He said, "What the Hell they got you round here for?" Next day Shepard sent two more men to help me. When the job was finished Shepard told him to lay off a while until he regained his strength because the Company couldn't make any money on him that way.

Since then he was superintendent for Advance Construction Company. Started to work for them about a year after leaving the defendant. In the mean time worked for three weeks for Portland Elevator Company at \$4.00 a day. After that worked for McGinnis and Reed, as Superintendent of Building Construction work and received \$35.00 a week. Worked for them for four months.

After an interval of about six months went to work for the Advance Construction Company and worked for them about four months, practically up to the present time as Superintendent of their build-

ing construction work, at \$30.00 per week. Built the East Side Library and arranged for concrete building on 21st Street.

The bucket had never fallen off before that he knew of at that time, but has heard since that it had.

“Q. Now, in your direct examination, you said that you never had your attention called to this hook. As a matter of fact you had seen it there every day, had you not?

A. Using it there every day.

Q. Both fastening the bucket to it, and unfastening the bucket from it?

A. Well, it was not that we took the cable off. We never took the cable off the hook, it was just taking the hook off the bucket—that was all.

Q. The hook at all times was fastened to the cable?

A. Yes sir, that is fastened on there with Crosby clips.

Q. But in doing the work, it would be necessary very frequently for the bucket to be taken off the hook?

A. Yes sir, it was taken off practically every load.

Q. And sometimes you would take it off, and sometimes someone else would take it off?

A. Yes sir.

Q. Sometimes you were down in the hole, and at other time somebody else?

A. Yes sir.

Q. And during all of the time that you had used

this hook, you never made any complaint about its being unsuitable?

A. No sir.

Q. And as a matter of fact, you didn' tthink that it was unsuitable?

A. I didn't catch that question there.

Q. I say you really didn't think it was unsuitable, because you never made any kick about it.

A. Well, I thought it was all right.

Q. And the hook was perfectly in plain sight so you could have seen it while it was being used there?

A. Plain sight there all the time.

Q. And as a matter of fact you did see it?

A. Couldn't help but see it.

Q. And you knew that if the bucket would strike against something, so as to be jarred loose from the hook, it might fall down into the hole?

A. That never crossed my mind.

Q. Well, you probably didn't think of that specific thing, but then you understood that, didn't you?

A. Well, I didn't think it would come off of there.

Q. But you knew that if it did come off, the bucket necessarily would fall?

A. That's a fact.

Mr. FULTON: Yes, most of us would know that.

Q. And you understood also that if the bucket fell while you were down in the well there, and it struck you, you might be injured?

A. Yes sir, found that out by experience.

Q. Well, you knew that beforehand too, didn't you?

A. A question like that never crossed my mind."

On re-direct examination, Christian Luck testified that the other men working with him were getting \$3.50 and \$2.80. All the huskies, that is, the ones that did the most work, got \$3.50. Didn't know what his helper received as he did not set a price on wages. Had nothing to do with the hiring and discharging of the man. Commenced to keep time about two weeks after starting on the job at Shepard's request.

On re-cross examination, he testified that he thought two-thirds of the men got \$3.50, except the hoist boy who received \$1.25 or \$1.50.

On re-direct examination he testified that the extent of the work done by him since the injury was between five and six months, altogether. Is not employed now and has not been since December first last year, because it is pretty hard for one to get a job who isn't able to work. On the superintending jobs he had practically nothing to do but to walk around with his hands in his pockets, overlooking the work. The work on the Pacific Hardware and Steel building was too hard for him. It affected his back and he had backache all the time.

On re-cross examination, he testified that on the Pacific Hardware and Steel job he worked from 2½ to 3 months, possibly only two, but not until the building was finished.

JACK ELIA being called as a witness, for the plaintiff, testified as follows:

Was employed by Otis Elevator Company on February 24, 1910, as a digger. Remembers the accident

to Luck. At that time was in the well standing with one foot on the ladder and the other foot on the casing. The ladder was used to go up and down the well. The casing was about 15 feet above the surface of the fill. Luck was at the bottom of the hole.

“As I was standing there, why, there was a load of dirt come down, and that cable coming down, it was at this distance, 85 feet or 86 feet; when it come to the bottom of the hole, it had a tendency to twist the cable just twists as it goes down with the bucket. It is just a nautral turn all the way down until it reached the bottom of the hole. By the time it gets to the bottom it had an awful big twist in that cable. As near as I could make while I was standing there, the bucket happened to hit the casing. As near as I could feel; my thoughts was just as soon as that hit the casing, it released the weight of that bucket and the cable untwisted and turned the hook out and the bucket came down. That is as near as I can make.

Q. The bucket——

A. Separated from the hook.

Q. —separated from the hook, and fell, of course?

A. Fell on top of Mr. Luck.

Q. Did you see it strike him?

A. I did.”

Q. What was the effect of the blow?

A. Why, I thought, to my knowledge, that if it had been any ordinary man, it would have killed him.

Q. Just what did it do,—knock him down?

A. Knocked him right down, doubled him up just in a pile.

Q. Did it go on top of him?

A. Yes, went right on top, just doubled him up in a pile—just doubled him right up in a pile.

Q. What did you do, if anything?

A. Why, for a minute I didn't know what to do—for a second, I didn't know what to do and the next second I started down the hole and takes the bucket off of him. Well, he says—well, on my way he says: "Hurry up", he says, "take the bucket off." And I got down there and took it off, and by that time it didn't seem like he knowed much any more, so I hol-lered up to send down some water right away, and they sent down some water, and I began to bathe his head. I bathed him all over, and tried to give him a drink, and he would swallow, and was bleeding from the mouth, as near as I can remember. Seemed like he was going—about gone, and I told him to take—I will send him up in a bucket. So we hooked the bucket up, put him in the bottom, and hauled him up on top.

Examined Plaintiff's Exhibit "3", which, if bent a little straighter out, would look more like the hook.

Mr. Shepard was superintending the work and discharged him. Shepard hired and fired.

"When I was digging down in the hole I thought I was in charge."

On cross-examination, Jack Elia testified that Luck was down in the hole and he was at a point about level with the top of the casing which was approximately 13 feet above the surface of the fill. There were two sizes of casing, one 15 or 15½ and the other

16½. The hole was 3 feet square or 3 feet 6. Doesn't remember what he was doing at the time of the accident, but had one foot on the casing when the bucket struck the casing.

Doesn't remember if he was looking at Luck or not. The cable had a twist acquired in going down the 86 feet. There was a pully right over the hole but doesn't remember if it was stationery or on a swinging boom. Doesn't remember if he noticed the bucket as it came down the hole. Doesn't remember where the dirt came from which had been loaded into this bucket. Sometimes the dirt was taken from in front of the hole and sometimes 30 or 40 feet away, in which event, the bucket would be loaded onto a wheel barrow and after being filled and wheeled back, the hook would be fastened into it and then lowered down into the hole. Doesn't remember if the bucket on this occasion was revolving or twisting as it came down or whether it came down straight. Did not see the bucket twist, and did not see it strike the casing or the side or wall of the well. Heard a noise which sounded like the striking of the casing. The first he saw of the bucket was after it had fallen on Luck. It did not then have a sledge hammer in it. The hook was made out of an iron bolt ½ inch in diameter. The hook resembled plaintiff's Exhibit "3" except that it was 1 inch thick and was straightened out more. Doesn't remember when he started to work on the job. Luck was working there when he started. Was digging practically all the time. First received \$2.80 a day and then \$3.50. The hook was used during the whole

of the time he worked there, both in lifting the bucket out of the hole and in lowering the bucket into the hole, and was used constantly during the time he was there up to the date of the accident. Luck was an all-round man on the job, doing a little of everything. Didn't know who was keeping the time. Was helper to Luck who was a mechanic. At times he would comply with Luck's directions, at others Luck would do his directions, such as sending him down tools or other things upon his request. At the time of the accident there was but one shift. Sometimes he would rig up the apparatus, sometimes Luck would. Shepard used to come round and give a good many orders.

“Q. What did Mr. Luck do with reference to these other men about giving orders and directions to these other men?

A. Why he—they would give the same orders that I would give. Most of them gave the same orders that I would give them when they were working in the hole—give the same thing. I would have to obey their orders just the same as they obeyed mine, at the top of the hole.

Q. By what do you mean signals for the operation of the hoist?

A. What is that?

Q. Do you mean about giving signals in regard to the operation of the hoist?

A. No, anything that you want from the bottom of the hole—anything that you want, you had the right to give orders up there for them to do as you wanted them to do.”

He did not put in orders to the shop for appliances. Doesn't know if Raveau or Bristow or Luck did that. Was discharged by Shepard.

On re-direct examination, he testified that he was helping fill the well, with plaintiff. He and the plaintiff both dug together alongside of each other, and worked in filling the well in the same way. The bucket was filled to the top with cement gravel and weighed in the neighborhood of 500 pounds. The hook was not broken, simply twisted out. Gads were used in digging the cement gravel and Shepard and Mr. Green used to come and ask how many gads to be sent up, and they used to send gads from the shop as they were needed.

The hook did not become loose from the cable but came loose from the bucket.

"Q. Did the bail or handle of the bucket break?

A. No, it just came out through from the eye of the bucket."

GEORGE HYDE, being called as a witness, for the plaintiff, testified as follows:

Was employed by Otis Elevator Company on Olds, Wortman and King job, commencing about January 1, 1910, and working until after the holes were through. At the time Luck was injured was working on the night shift. Had the hook used at the time of the accident made himself in October or November, 1908, for work on the Y. W. C. A. building. On that job it was different. The way he had it made it was a perfectly safe hook, known as a "pig tail hook." The hook had been spread. Shepard told him it had been

sent to the shop where it was spread because it was too hard to unhook. The bucket had to be unhooked every trip up and down. By spreading it it had a tendency if anything struck the bucket to rise up and drop off. A day or two after he had been to work there, some time in January, 1910, he told Shepard that the way the hook was spread it wasn't safe, that he didn't like to work under it and Shepard gave him to understand that he could either work under it or quit, and he stayed there and worked on the job just the same. The hook continued in the condition in which it was when he called Shepard's attention to it until after Luck was hurt.

On cross-examination he testified that he was working on the night shift, working on the same hole. Sometimes he was on the night shift and sometimes on the day shift. Luck sometimes worked on the night shift, before the accident. When Luck was on the night shift, part of the time he worked with him. At the time of the accident there was only one hole sinking, but the night shift used the same hook as the day shift. From the first of January, 1910, until the time of the accident, the same hook was used, and it was in the same condition during all of that time.

"Q. You had a contract, did you not, for the Y. W. C. A. job?

A. I did, yes.

Q. And gave it up and then went to work for the company?

A. Well, I was forced out of it, yes.

Q. The Company took up your contract, did they not?

A. Well, they—they crowded me out.

Q. Well, they took up the contract?

A. Yes sir.

Q. And then you went to work for them on the Olds, Wortman & King job?

A. Yes sir.

Did not work for Otis Elevator Company from October or November, 1908, until January, 1910, during which time he had nothing to do with the cables or hooks or other appliances in use by the defendant. His conversation with Shepard took place when they were finishing the first elevator shaft.

“Q. Who were present when this conversation took place?

A. Well, I couldn't say as to that. There was a number around there, but Mr. Shepard and I were talking together at the time. I don't know.

Q. Do you remember any of the people who were present at that time?

A. Oh, there was—I think Revau was there, and Val Bristow, Chris Luck.

Q. Mr. Luck was there?

A. He was in the building, but I don't know as he was right in the immediate vicinity at that time—couldn't say how far he was—whether he was in the hole or where he was.

Q. What time of day was this conversation?

A. Well, as near as I can remember, it was in the forenoon some time.

Q. It was when?

A. In the forenoon, I think.

Q. You were working on the day shift then?

A. Yes sir, I worked part of the time on the day shift, and part of the time on night.

Q. You worked with Mr. Luck then, on the day shift?

A. Yes sir.

Q. And you saw him using this hook, did you?

A. Why, I guess I did. He was using it part of the time, and I surely would see it, although I couldn't say that I can call any action where I seen him handling it.

Q. But he was in the crew that was using the bucket?

A. He was in the crew, and he undoubtedly used it, of course.

Q. And you think that Mr. Revau and Mr. Bristow and Mr. Luck were present when you had this talk?

Mr. FULTON: He didn't say that. I beg your pardon. He said they were there in the vicinity, or something like that. He didn't say they were present.

A. They were working in the building. I don't remember—

Q. I asked who were present—that is what I want to know.

A. If you mean who was talking, nobody talking but Mr. Shepard and I.

Q. Nobody talking with Mr. Shepard?

A. I was talking with Mr. Shepard alone.

Q. Who was listening to the conversation?

A. I don't know—there was 300 or 400 men working in the building. I couldn't tell who was listening to it.

Q. Who was sufficiently close to hear the conversation?

A. I don't know that, because I wasn't paying no attention. I never thought anything about it until here lately, I got to studying it over. Most of it had left me entirely, because I had paid no attention to it, didn't concern me in no way, that I could see.

Q. You used the hook on the work there as it was, did you not?

A. Yes sir.

Q. And notwithstanding that you thought it was unsafe to use it, did you not?

A. I surely did, yes. The hook had to be used—unhooked every time the bucket was sent down.

Q. How?

A. The hook had to be unhooked every time the bucket was sent down. That was why it was spread so could handle it easily. The empty bucket was sent down, and a full bucket of earth sent out.

Q. Did you work down in the well?

A. I worked there pretty near all the time was digging, yes sir. One shift or the other.

Q. And during the time they were filling up?

A. I worked in the bottom, yes, while filling up, dumping the bucket.

Q. And this conversation that you spoke of, took place very shortly after you went to work there on the first of January, 1910.

A. Yes sir.

Q. And the hook stayed in the same condition during that time to the day of the accident?

A. Yes sir, I wasn't digging at the time we had the conversation. I was wheeling the dirt to the hole."

Luck worked on the Olds, Wortman and King job within a week or such a matter after the accident. Doesn't remember that he said anything to Luck, or about Luck saying anything to him about the hook or its connection. Luck never complained to him that it was unsuitable for the work. Even after spreading, a person who knew nothing about the hook, would consider it a safe hook.

H. A. TAYLOR, being called as a witness on behalf of plaintiff, testified as follows:

Questions by Mr. FULTON:

"Q. Mr. Taylor, where do you live?

A. Portland, 1275 East Sixth Street, North.

Q. Did you ever work for the defendant, the Otis Elevator Company?

A. Ys sir.

Q. When?

A. 1908. I don't remember the month; November or October.

Q. In what work were you engaged at that time?

A. Rigging elevator shaft; what they term the well.

Q. Where?

A. Y. W. C. A. building.

Q. Y. W. C. A. Building?

A. Y. W. C. A. Building.

Q. The Young Women's Christian Association?

A. Yes sir.

Q. Were you working there first when Mr. Hyde was on the job or were you there at any time when he was on the job?

A. Yes sir.

Q. Were you there after he left the job and when the Otis Elevator Company took it over?

A. Yes.

Q. Did you continue to work for the Otis Elevator Company?

A. Yes sir.

Q. Now, after that—after Mr. Hyde had left, the Otis Elevator Company took the work over; what were you doing for it?

A. I was digging the shaft.

Q. Digging in the shaft. Did you at that time notice how the bucket was connected with the cable—the bucket which carried the dirt?

A. Yes, sir, the bucket was connected with what is termed a pigtail hook.

COURT: What kind—pigtail?

A. Pigtail hook, yes sir.

Q. Was it similar to that?

A. Yes, just about the kind of a hook.

Q. Now, while you were working there in the well, state whether or not any accident occurred, and if so, what?

To which question counsel for defendant objected as being incompetent, immaterial and irrevelant.

"COURT: Well, I suppose if it occurred through the use of this hook, it would be competent to show that the company knew it was an imperfect hook.

Mr. FULTON: I propose to show that practically the same accident occurred there, and that it was communicated to Mr. Shepard, the superintendent of the company."

Whereupon, the Court overruled defendant's objection to which ruling defendant then and there excepted, which exception was allowed, and the witness further testified:

"A. A bucket fell 53 feet there.

Q. What say?

A. I was working in the bottom of the shaft, about 53 feet from the top of the basement of the Y. W. C. A. Building, and a bucket came down on me.

Q. Well, how did it come down? How did it happen to come down—slip off the hook?

A. It slipped off the hook.

Q. As it was descending into the well?

A. Yes sir.

Q. What did it do to you?

Mr. LEITER: I object to that as incompetent.

COURT: The only question is whether it slipped off the hook.

Mr. FULTON: I don't insist on that if objected to.

COURT: The extent of this man's injury has no bearing on this case; it is only competent for the purpose of showing that the company, or tending to show that the company knew it was an improper hook.

Q. Do you know whether Mr. Shepard knew that the bucket came off at that time when you were in the well?

A. No sir, I do not.

Q. What say?

A. I do not.

Q. Did you have any talk with him about it?

A. No sir. I had a talk with the man that was working on top of the shaft, taking care of the bucket—unhooking and hooking the hook in the bail.

Q. What say?

A. I had a talk with the man that was hooking and unhooking the hook from the bucket, in order to dump the bucket; he had to unhook the hook.

Q. Never mind what he said. I understand you had a talk also with Mr. Shepard about the injury you received at that time. Did you have any talk with him about the injury you received at that time?

A. The injury that I received at that time—

Mr. LEITER: I object, may it please the Court, as incompetent, immaterial and irrelevant.

Mr. FULTON: I think it would tend—it is not competent for the purpose of showing injury.

COURT: No, but for the purpose of bringing knowledge home to the company of the accident.

A. I told Mr. Shepard at the time that I wanted to be sure the man understood how to hook the hook in there. I didn't like to go in the shaft and put my life in danger at the bottom of that shaft with a man who didn't know anything about the hook.

Q. Was that after the bucket came off?

A. No sir; before the bucket came off.

Q. I mean after the bucket came off?

A. No sir, not that I remember.

Q. I was mistaken, I thought you had. That is all.

Whereupon, counsel for defendant moved that all of the testimony of said witness H. A. Taylor in regard to the falling of the bucket be stricken out, because Counsel for plaintiff had failed to show that defendant had any knowledge of the occurrence,—which motion was overruled, to which ruling defendant then and there excepted, which exception was allowed.

MRS. LIZZIE LUCK, called as a witness for plaintiff, testified that she is the wife of the plaintiff; that Mr. Luck's health was excellent before he was hurt; that he was always well, never complained and was a strong man. That since the accident he has not been in good condition, has complained constantly of his back and at times when he would do any kind of work at all, no matter how light, a red spot would appear in the center of his back. She noticed it constantly after he had done anything. Mr. Luck had to depend on his labor for a living.

Whereupon, plaintiff rested his case.

R. W. GREENE, called as a witness for defendant, testified as follows:

Is a salesman for Otis Elevator Company, employed by them as cashier and accountant in February, 1910, having charge of making up the pay rolls, paying the men and looking after the various accounts of the Company in Portland. Kept the time of the plain-

tiff, whose wages during February, 1910, were \$4.00 a day, payable weekly. Eight hours was a day's work but sometimes Luck worked more than eight hours, or overtime. Time sheets were made out by Mr. Luck showing the time for himself and the men under him, which were turned in to the witness who would make out the payroll.

After refreshing his memory from a press copy of the weekly pay roll, the witness testified that during the month of February, 1910, prior to the accident, plaintiff was receiving \$4.00 a day, or 50c an hour. Slip dated February 22, 1910, being part of defendant's Exhibit "C", showed the time entered by the foreman, who was Mr. Luck.

On cross-examination, the witness testified that he knew Luck was foreman because he looked to him for the time slips and he kept the time of all those men; that of the named shown by the weekly payrolls, A Strain, a machinist, received 62½ cents an hour; Stemall, a machanic, 56¼ cents an hour; W. O. Ash, repairman and foreman construction, 56¼ cents an hour; J. H. Gill, mechanic, 56¼ cents an hour; J. D. McDonald, a mechanic, 56¼ cents an hour; J. Buckley, a mechanic, 56¼ cents an hour; O. F. Patrick, inspector, foreman and elevator constructor, 50 cents an hour; William Boyer, a mechanic, 50 cents an hour; Gus Larsen, a mechanic, 50 cents an hour; H. H. Gallagher, a mechanic, 50 cents an hour; D. H. Moore, a mechanic, 50 cents an hour.

Is still in the employ of the company as salesman. Patrick was formerly a constructor before he become

a repair man. These wages were in effect when witness was employed by the Company on September 22, 1909.

On re-direct examination the witness testified as follows:

Doesn't think that any of the names above referred to by counsel for plaintiff were men working on the Trustee Building at the time Luck was hurt, but couldn't be sure about it. Of the names found on time ticket used February 22, 1910, being a part of Defendant's Exhibit "C", J. Elia was receiving 35 cents an hour; P. Revau, 43 3-4 cents an hour; A. Ekblom, 35 cents an hour; F. H. Goodson, 35 cents an hour; W. C. Worthington, 35 cents an hour; D. Abbott, 43 3-4 cents an hour; V. Elia, 35 cents an hour; H. F. Holt, 43 3-4 cents an hour; H. Hoefer, 35 cents an hour; G. A. Hyde, 35 cents an hour; V. Bristow, 30 cents an hour.

After the accident, during the months of April and May, 1910, plaintiff was paid the same wages as before the accident, namely 50 cents an hour or \$4.00 a day.

PAUL REVAU, called on behalf of defendant, testified as follows:

Is working now for Hurly Mason as Labor Foreman. Worked on the Trustee Building for defendant at the time Luck was injured and had worked there probably a month before the accident. Worked down in the shaft digging, wages \$3.50.

"Q. I say, state whether or not you were acquainted with the hook that was used on that job there.

A. Well, I wasn't acquainted with the hook at all, as far as whether the hook was dangerous or not, anything like that.

Q. You had seen the hook?

A. Yes.

Q. Did you ever hook it and unhook it from the bail?

A. Yes.

Q. So that you do know what the hook was, and what it looked like?

A. Yes sir.

Q. And it was the same hook that was used there during the entire time of this work that was being done on this Trustee Building?

A. Up to the accident.

Q. And state whether or not Mr. Luck had used this hook doing the work that was being done there?

A. Well, that hook was used until the time of the accident.

Q. Who was your foreman up around there on that work, when you were there?

A. Well, I would get some orders from Chris, and I would get some from Mr. Shepard.

Q. Was Mr. Shepard there all the time?

A. Well, I couldn't say, I was down below most of the time.

Q. Who is Chris? Who do you mean when you refer to Chris?

A. Mr. Luck.

Q. Yes, sir, you say you took orders from Mr. Luck—?

A. At times, yes.

Q. And sometimes you took orders from Mr. Shepard?

A. Yes.

Q. Was Mr. Shepard there on the job all the time?

A. Not all times. I wasn't up on top.

Q. Well, did you say Mr. Shepard was there pretty much of the time, as a matter of fact?

A. No, not very much.

Q. Not very much. When Mr. Shepard was not there, who did you look to for your orders and instructions?

A. Well, in fact I would go down in the shaft in the morning, and I wouldn't need any orders at all. I would be down below all day.

Q. But you did say you got orders from Mr. Luck during the time you were working there?

A. Yes, some orders.

Q. Did you ever give Mr. Luck any orders?

A. No.

Q. Did you ever give anyone any orders?

A. I didn't unless I would want something above—I would holler up and get it.

Q. You would holler up?

A. Yes.

Q. If you wanted something?

A. Yes.

Q. But, as the work progressed, you didn't attempt to give any one any orders or instructions as to how the work should be done, did you?

A. No.

Q. In the absence then of Mr. Shepard, you looked to whom? You looked to whom for your orders, or to whom did you look for orders?

A. Most any one that would give them to me.

Q. Beg pardon?

A. Most anybody that would give them to me.

Q. Would you have taken orders from me if I had been up there?

A. It all depends.

Q. Was there no one on the job to whom you looked as the foreman there?

A. Yes sir.

Q. Well, who was it?

A. Mr. Shepard and Chris.

Q. Mr. Shepard and Chris?

A. Mr. Luck."

Witness stated that a hook handed to him resembled the hook in use at the time of the accident, except that the hook used was not so long and did not extend down so straight.

This hook was introduced and marked Defendant's Exhibit "D".

At the time of the accident he was over the shaft filling the bucket. After the bucket left him and went down a little ways he could not see it any more. He was sending the bucket down for the purpose of filling the hole. Several buckets had been sent down before the accident. Luck and Elia were at the bottom of the shaft and several buckets had been sent down by him. As the empty bucket came up he would pull it to one side, fill it and send it back again. In filling

the shaft they would pull the bucket to one side, fill it and let it go down without detaching the hook. The bucket would be raised by the hoist and swung right over into the hole. The hook in use at the time of the accident had been used during the entire time that the bucket was being lowered with gravel and dirt.

On cross-examination the witness testified as follows:

Did different kinds of work. In a way Shepard was the boss or head man. Was hired by Shepard and not by Luck. Couldn't say as to Luck having power to discharge him. Shepard told him his wages would be 35 cents on top and \$3.50 below. The hook in use was shorter than defendant's Exhibit "D". Couldn't describe the hook very well, but defendant's Exhibit "D" is something similar to it. Worked on the job until it was finished. Couldn't say what became of the old hook. They stopped using it right after the accident and put on a different hook, something similar to a cork screw, having more twists in it. Never saw the other hook again. Luck was in bad condition when they took him out of the hole. Doesn't remember who took the hook off the cable, to which it was fastened by means of a clamp. It was securely fastened to the cable and could not easily be disconnected, except by a wrench. Another hook was put on. Doesn't know what became of the old hook. As it went down at the time of the accident the bucket was loaded with gravel and dirt mixed. No tools in it that he can remember.

On re-direct examination the witness testified that he didn't know if Luck ever hired or discharged any men on that job. So far as he knew Luck did not hire or discharge any men. There were men coming and going continually, but he didn't know who hired or discharged them. While Shepard was absent looked to Luck as foreman on the job.

On re-cross examination the witness testified as follows:

“Q. So you would all look to him if you wanted any directions or anything. He was the oldest employee there and you sort of looked to him to lead. That was about it, wasn't it?

A. Yes sir.

Q. You say you never knew him to hire or discharge anybody?

A. Mr. Luck?

Q. Yes.

A. No.

Q. You never heard of him doing so did you?

A. No.

JOHN J. ERICKSON called as a witness for defendant, testified as follows:

Is Superintendent of repairs for the defendant, with headquarters at the shop at 88 First Street; has worked for defendant four years. Was with them in January and February, 1910, and at the time Luck was working on the Trustee Building. Was his duty to look after the work around the shop, getting material in and out of the shop. Also had charge of the storeroom.

“Q. State whether or not Mr. Luck had free access to the tool room or storeroom of the Otis Elevator Company.

A. He did.

Q. And did he ever exercise his right of having access to that storeroom.

A. Yes.

Q. State whether or not Mr. Luck ever came there and took therefrom tools and instruments and appliances for use on the work that he was doing.

A. On several occasions he came and got gads.

Mr. FULTON: I can't hear you.

A. On several occasions he got gads there for digging the hole with. Other times he came there and ordered material made that he wanted from time to time.

Q. Did Mr. Luck ever come there and order material or other supplies or appliances prior to February 23, 1910, and while he was engaged on the Trustee Building job?

A. Yes sir.

Q. State what, if you know, Mr. Luck got at any time from the storeroom prior to February 23, 1910.

A. He had a casing clamp made.

Mr. FULTON: What?

A. A casing clamp.

Mr. FULTON: A casing clamp?

A. Yes, and he had a spider made for plumbing the casing.

Q. What was that last, Mr. Erickson?

A. A spider.

Mr. FULTON: A spider made for plumbing the casing as I understand.

Q. Anything else that you remember?

A. Somehting else but I don't remember now just what it was.

Q. Just explain to the jury what you mean by a casing clamp.

A. A casing clamp is a clamp made to clamp the casing when it is lowered into the hole.

Q. Was that in stock at the storeroom?

A. No, it had to be made in the shop.

Q. And under whose orders and directions, if any, was that clamp made?

A. Mr. Luck ordered it, and I placed the order in the shop for it.

Q. Did Mr. Luck tell you what sort of a clamp he wanted?

A. Yes sir, he made out a sketch of it at that time.

Q. Made you a sketch of it?

A. Yes.

Q. Explain to the jury what is meant by a spider?

A. A spider is a contrivance that hangs on a line into the hole—into the casing, and it has several prongs on it; is supposed to hang plumb so they can plumb this casing and get it straight up and down.

Q. A spider then is used sort of as a plumb?

A. Yes, as a plumb.

Q. And at whose direction was this spider furnished? On whose order was this spider furnished?

A. Mr. Luck ordered that made.

Q. Was this spider made specially on this job?

A. Specially for that job.

Q. State whether or not the Otis Elevator Company had any variety of hooks in their storeroom?

A. No, they did not.

Q. How were those hooks furnished for doing the work on the different jobs?

A. They were made.

Mr. FULTON: What hooks.

Mr. LONERGAN: I am speaking of the hooks for hoisting and lowering purposes.

A. Hooks for hoisting and lowering?

Q. Yes.

A. All depends on what purpose it was to be used for.

Q. Yes sir, but if there was a hook needed for any particular job, what was the necessary method pursued to obtain it?

A. Oh, had to issue an order to the shop for the man in the shop to make it. ?

Q. Would Mr. Luck have the right to get a hook of that kind in that way?

A. Yes sir."

On cross-examination, the witness testified as follows:

"Q. Anybody would have a right to get a hook of that kind made that way?

A. Anybody that was supposed to be foreman on the job.

Q. Anybody working there?

A. Any man that was foreman on the job.

Q. Any man working on the job would have a right to get it?

A. Yes, if he had orders from his foreman.

Q. You don't know who Mr. Luck had orders from when he went there? You don't know whether Mr. Shepard told him to go get it or not?

A. No, I presume he got it on his own account.

Q. You say you presume?

A. Yes.

Q. You don't know?

A. Well, no.

Q. You don't know, do you?

A. No.

Q. Where did they get the spider that was used on the Young Women's Christian Association building?

A. That was made in the shop.

Q. Who ordered it?

A. Well, I don't remember who ordered that now. That was during my first career there. I don't remember."

On re-direct examination the witness testified as follows:

Q. Mr. ERICKSON, do you know the different foremen that are employed by the Otis Elevator Company?

A. Mr. Luck was foreman.

Q. You know that he was a foreman?

A. Yes sir.

VAL BRISTOW, called as a witness for defendant, testified as follows:

....

Is working on the Holtz Building, Fifth and Washington. Worked on the Trustee Building almost from the start to the finish of the job, and at the time of the accident to Luck was running the electric hoist used to hoist the bucket out of the hole.

“Q. From whom did you receive your orders and directions while working there?

A. I received mine from Mr. Luck.

Q. Were you acquainted with the hook that was used on that job there at that time on the Trustee Building?

A. Yes sir.

Q. I will show you Defendant's Exhibit “D”, and ask you if that resembles in any way the hook that was used on the Trustee Building job up to the time of the accident to Mr. Luck?

A. I believe it was a little shorter, this bottom part here, and it wasn't exactly straight down, but it didn't lack within half an inch of being straight down, might have been a least little angle—about half an inch this way, and the least bit shorter—well, I would say two inches shorter.

Q. Then, with the exception of this extension on the end of the hook being about an inch or two, two inches shorter, and having a little different angle, this is practically a duplicate of that hook?

A. Yes sir, it has got about the same turn. Half inch higher or more here.

Q. Same size this way?

A. Yes sir.

Q. And the hook or crook in that is about the

same, is it?

A. Yes sir.

Q. Was that the condition as you have described the hook during the entire progress of that work up there to February 23, or up to the time of the accident to Mr. Luck?

A. Yes sir.

Q. And had Mr. Luck been using that hook on that work himself?

A. Well, he didn't hook the buckets with it; any of us whoever was working over the hole done the hooking as far as that was concerned.

Q. But the hook was being used there where Mr. Luck was doing his work, was it not?

A. Yss, sir.

Mr. Hyde is his stepfather. Never heard Mr. Hyde make any statement to Shepard about the condition of the hoist used on that job and never heard Mr. Hyde make any statements to Luck about the hook. Couldn't see the accident. Was running the hoist off to one side. All he knew was that the cable was slacked and the bucket dropped. A signal had been given to lower the bucket. He started to lower it and it went down about three feet, and the cable went slack. The bucket had been partly down in the hole. They had let it down with a sledge hammer and claw hammer with which to fix the casing. They already had a bucket of dirt so they let the hammer down in the dirt and Luck took it out and used it working on the casing. The bucket was raised up a ways to get out of his way. After they got the casing

plumb was going to let the dirt down again. Witness lowered it; let out about three feet of cable, when the bucket dropped off. Couldn't say just how far the bucket was down in the well. Doesn't remember who gave the signal to let the bucket down. Sometimes they had a whistle, sometimes they hollered.

“Q. I wish you would explain, Mr. Bristow, to the jury just what Mr. Luck did upon that job in the way of directions and ordering, if any?

A. Well, he bossed the moving around of things—whatever was moved around.

Q. Whenever there was any moving to do you say he bossed that?

A. Well, he was boss over me, I know, and anything I had to do. I took my orders from him. I was an apprentice. I am an apprentice. I took my orders from him.

Q. Did you ever hear Mr. Luck giving orders to any of the other men on the job?

A. Yes, I have.

Q. To whom have you heard him give orders?

A. I couldn't say what orders, or when or how, but most all the time, most all the orders, as far as that goes, to the helpers that are under him.”

On cross-examination, the witness testified:

Q. That is simply to the helpers that were under him?

A. Yes, sir, not to any of the mechanics, because they were as much foreman as he is.

Q. Just the same as any other mechanics?

A. Yes sir, he was one mechanic on the whole job.

Q. Now, you say you were an apprentice?

A. Yes sir.

Q. Who hired you?

A. Mr. Shepard.

Q. Never knew of Mr. Luck ever hiring or discharging anybody?

A. No, not that I know of, not that I know of.

Q. Mr. Shepard did all of that did he?

A. I wouldn't say whether he did or didn't, or who did, because I don't remember.

Q. That was your understanding there, wasn't it?

A. I know who hired me, that is all.

Q. That is your understanding that Mr. Shepard was the man who did the hiring and discharging of the men, wasn't it?

A. Well, I don't know.

Q. You are still working for the company, are you?

A. Yes sir."

About three feet of cable had been let out before the bucket slipped off. Couldn't say exactly where the bucket was in the hole at that time. Could see the cable slack, that is how he knew something slipped off. Was six or seven feet from the mouth of the well, and could see into it about three feet down. Had let down a sledge and a claw hammer on the trip before. They took the sledge off of it. When the bucket dropped there was nothing in it but cement gravel.

Doesn't remember who took the old hook off. It was taken off and the hook disappeared. Another

hook was not put on right away. The cable was fastened to the bucket and later another hook was made. Doesn't know who took the hook off the cable. Luck did not return until ten days or two weeks after the accident, and the hook had been gone before he got back. Doesn't think Shepard was in town on the date of the accident. Didn't see him there. Doesn't know that the hook was taken down to Mr. Greene and put in the safe, and never heard that. Won't swear that he didn't take the hook off but doesn't remember anything about taking it off. Thinks he would remember it if he did. Doesn't remember having a conversation with Luck about the hook after Luck came back. Did not say to Luck that witness took the hook off and Mr. Shepard sent it to the shop. Doesn't remember that Shepard arrived half an hour after Luck was injured.

On re-direct examination the witness testified that there were a number of men coming and going on the job, but doesn't know who hired or discharged them. Shepard hired him, before Luck was in charge of the work.

JUROR:

'Q. Now, did you ever receive any orders from Mr. Luck?

A. Yes sir.

JUROR: Concerning his own work or did you ever see him give any orders to any other men concerning their work?

A. Yes, I have.

JUROR: When he gave you orders, did you ever

at any time see him come up out of the shaft, look around and see what was going on, give orders, and go back and attend to his work in the shaft, or did he simply send up orders concerning the work down below?

A. Well, he worked below and above and all around."

All of the men changed shifts. Worked sometimes below and sometimes above. Luck took his turn at digging and taking out the dirt. Luck was a good workman; as far as he knew the other men on the job didn't give any orders or directions, and never heard of any other man giving orders on the holes.

On re-cross examination the witness testified as follows:

"Q. Now isn't it a fact that Mr. Luck was simply an old employee there, and knew things better than most of the others, and he used to direct, but he did the same work as the others did?

A. Well, he was just the same as any other mechanic; when they are sent out with their helpers to put in a certain job, they are the boss of their helpers.

Q. That is all?

A. Yes sir, give directions.

Q. Yes, that is it."

On re-direct examination the witness testified as follows:

"Q. Then all the men that worked on that job were, in a sense, helpers of Mr. Luck, were they not?

A. Yes sir.

'Q. That is what you mean when you say helpers, is it not?

A. That is on the holes.

Q. On the holes?

A. Yes.

Q. So when you say he bossed all the helpers, you mean he bossed all the men doing the work on that job under him?

A. Yes sir.

Q. And he was a mechanic?

A. Yes sir."

On re-cross examination the witness testified that he never heard Luck giving the men orders for their pay.

Whereupon, counsel for defendant, asked permission of the Court to recall Witness Hyde for cross-examination, for the purpose of laying a foundation to impeach Witness Hyde's testimony, certain information having been imparted to counsel for defendants since said witness was under cross-examination; which application was denied by the Court, to which ruling counsel for defendant then and there excepted, which exception was allowed.

R. S. SHEPARD, called as a witness for defendant, testified as follows:

Is Superintendent of Construction for defendant. Such was his position in February, 1910. As superintendent of construction has complete charge of the installation of elevators from the time contract is signed. Places men on a job, instructs them how to put the elevator in and turns over the same when they are accepted. Jurisdiction extends over the entire State of Oregon. First hired Luck about four years

ago as an elevator constructor. Hired Luck as foreman on the Olds, Wortman and King job, which was started the latter part of November, 1909; not very much work had been done before Luck went on the job. The boiler and the pumps had been set up.

“A. Mr. Luck was the foreman in digging those well holes. We have two classes of men. We term them mechanics and helpers, and sometimes we put in a job with only one mechanic and a helper and other times a mechanic will have several helpers and other times he will have several mechanics, and we term the man in charge, we turn the job over and hold the man that has started the work, we hold him responsible for the right installation of the elevator, and term him foreman. How, he may have under his direction any number of men. They may be mechanics, and there may be helpers, but there is one foreman on each job, and all the rest of the men take their orders and report to him, and if they want any instructions they get them from him, although at times I might go onto a job and say to a mechanic or a helper laying around without any work, and say, ‘get busy at this, or get busy at that,’ without waiting to give the order through the foreman. But the usual way is for the foreman to get his instructions from me and transmit to the men.

Q. What arrangements was had with reference to the Olds, Wortman & King job, as to who was in charge of the work there?

A. Mr. Luck was in charge of the work there both before and after the accident.

Q. How much of the time were you about that job?

A. Well, we had a great number—that is, not a great number, but there was ten or a dozen jobs going; I guess we had fifty or sixty men working, and with my office work and attending to all the different jobs, I wouldn't get there more than probably two, maybe three, times a day; stay a few minutes and see the foreman; see if he needed any material or any men, and leave and go to some other job.

Q. What were the duties of Mr. Luck on this job?

A. Well, the duties were to see that the men kept going, to see that the pumps were kept in operation, to see that he kept dirt coming out of the holes.

Q. What duties did he have with reference to the appliances used in the progress of the work?

A. The same as all the foremen that we have. They send down—either they send a helper down as a messenger to the shop and order material, or they deliver it in person, or they deliver it to me, their orders for whatever they have. On our time slips, we have a place left there for the foreman to note any material or other things that he wants, and when he turns in the time slips, he writes on there what he needs to push the job along.

Q. Who had charge of the appliances, with reference to seeing that they were in fit condition to use?

A. Well, of course that is any man's duty working with tools. A man would be a fool that didn't try to see that everything was safe, but it was especially up to the foreman of the job, and of all jobs, I cautioned

the foreman time and again to use every precaution to safeguard the men's lives.

Q. Had you ever said anything of that sort to Mr. Luck on this job?

A. I certainly had, because it was no play work, digging those holes. It was a man's hard job, and there was many chances for getting hurt, if you didn't use the utmost precaution. We try in every way to protect the men's lives.

Q. As a matter of fact, during the time that Mr. Luck was on that job, what did he do, if you know, with reference to getting appliances or devices or materials for that job?

A. Oh, in numerous cases he has sent sketches for the shop for things that he wanted the blacksmith to make, and he has ordered his staging lumber or anything else he needed. When anything he needs on the job, all he has to do is to order it from the shop.

Q. Well, would such an order of which you speak, have to go through you?

A. No sir, no sir. Any foreman I authorize—

Q. In your absence from the job, Mr. Shepard, suppose some tool or some material or appliance would be needed on the work, whose duty would it be to procure that instrumentality?

A. The foreman in every case and only him.

Q. And in this case?

A. Mr. Luck was the foreman."

Luck was paid Fifty Cents an hour, with time and one-half for overtime. Luck was foreman at all times. He was no more foreman after the accident than be-

fore. Luck's wages were not increased after the accident occurred, and there was no change in his authority after the accident from what it had been before. Did not see the accident happen.

“Q. During the development work there, Mr. Shepard, did you see that hook which was used to fasten the bucket to the cable?

A. Yes sir.

Q. Explain to the jury what kind of a hook it was.

A. Well, it was a hook similar to the one laying on the table.

Q. By that you mean Defendant's Exhibit D.

A. Yes sir.

Q. For all practical purposes, Mr. Shepard, please state in what respect that hook which you now have in your hands differs from the one in use at the time of the accident?

A. To the best of my knowledge and belief, it is exactly the same. I don't know about its being any different.

Q. How about the crook part there? .

A. This?

Q. Yes; how does the hook you have in your hand compare with the one that was in use at the time of the accident?

A. I think it is just the same, as near as I can say from memory.

Q. How about the width of the crook there?

A. That is as wide as is necessary. The bail of the bucket was only half an inch in diameter, and it would easily slip through there, and it would do that on this

hook, and that is just the way the other one was, as near as I can tell.

Q. And how would the bail of the bucket be attached or fastened to the hook?

A. Let the pencil represent the bail of the bucket. The bucket would be hooked in like that, and then this part was over so there is the bail of the bucket right in there, and if the bucket lays in any other way, it is hard for it to fall out. Supposed to be the safest kind of a hook there is made.

Q. If the bail of the bucket were properly attached to the hook, what would be the danger, or the likelihood of the bail getting loose from the hook on being struck?

A. None whatever. Here is what they might have done. Of course, I don't know, but I may be allowed to say what might have happened. It is only my opinion.

Mr. FULTON: I object to what might.

Q. Well, in what way could the bail of the bucket become detached from that hook?

A. Through the hook being improperly fastened to the bail, through not being hooked properly.

Q. I see.

A. The bail could be just laid in like that. It would then hold the bucket as long as the bucket didn't land on anything. If the bucket landed on anything, why it would come unhooked, instead of the end being thrown over like that.

Luke returned to work after the accident, on March third, at noon, and worked until May 28, 1910, as fore-

man on the Olds, Wortman & King job until the holes were filled and after that as foreman on the Arthur job on the East Side, where he worked until that was completed and then he came into the shop. After the shop work was finished there was no other job to put him on, and witness let him out. Denied the conversation testified to by Luck concerning Luck's inability to work, and denied saying, "What the hell are you here for?"

After the accident Luck did not complain about his physical condition; made no statements about his inability to do the work, and did the work all right. Luck was putting in a big four thousand pound garage elevator, heavy work as any. Saw him at the work. In the shop he built some guy posts. Denied the conversation testified to by Hyde about the hook being unsafe and about ordering Hyde to keep on working there or quit the job. Hyde did not complain in any way at all about the hook on said job or about its being an unsafe hook. Never heard anyone complain about the hook being unsafe, nor did anyone call his attention to the hook as being improper or unsafe, or an unsuitable appliance for that work. Luck never made any complaint.

"Q. What instructions, if any, had you given to Mr. Luck in regard to the use of the appliances there?

A. In digging the holes we—as has been said before by different witnesses, the holes were square and about three feet by three feet six, and the man had to work in the bottom, and there was also a pump had to be down there to keep the water down, so he can

dig and it made the space very cramped in the bottom of the hole. Now, he picked loose sufficient dirt or gravel to fill a bucket, then he would whistle for the bucket and they would send it down to him. Now, that cable—in filling a bucket, that cable would be in the road.

Q. What?

A. That cable would be in the road. It was almost impossible to shovel and throw the dirt into the bucket with the cable attached to the bail, therefore it is necessary to use some sort of a hook, and this hook that we use was made by Mr. Hyde, who had had considerable experience in well digging, and the kind of work, and everybody considered it the safest thing that could be used for the purpose. Now, when we come to fill in the hole, it was a different proposition. Then we had a bucket, a square bucket instead of a round bucket, that we used in digging. We use a square bucket with a hinged bottom, because we had—there wasn't room in the hole to dump it. It had to be dumped from the bottom, but that bucket was filled right at the mouth of the shaft, and there was no occasion for ever taking off the hook, and I gave Mr. Luck instructions in every case when he was filling in, to either wire that hook so that it couldn't come off, the bail,—be thrown over, and become detached, or else take the hook off entirely and fasten the cable around the bail with clamps, bring the cable up and fasten it together with clamps above the bail, so there would be no possibility of this thing happening, because in lifting the bucket, it is not nearly so apt to be-

come detached from the hook as it was in lowering.

Q. Those instructions were given by you to Mr. Luck personally?

A. Yes sir.

Q. Mr. Shepard, Mr. Hyde also said something about the hook in use on the Olds, Wortman & King job being wider apart, the coils of the hook were separated further than on the Y. W. C. A. building?

A. I don't think that was the case."

On both direct and cross-examination the witness testified that he told Luck to wire the hook before the accident when they were filling in the other hole. The hook had been used on this well since the time Luck started work. This was the first instruction he had given about wiring the hook. Had not filled in other holes with Luck. This was the first time he had had any experience in filling in. He did dig another hole but didn't fill in. Considers this one of the safest hooks made.

Q. Why did you think it necessary to wire it then?

A. So that it wouldn't—so that there would be no danger of a careless man hooking that as I described just now.

Q. You considered there was danger of it?

A. A careless man.

Q. Couldn't you make a hook that wasn't susceptible of that danger?

A. No sir, the human element is everything.

Q. What hook are you using now?

A. Not using any hook.

Q. After this accident occurred, what did you use?

A. We used another hook similar.

Q. Similar?

A. Yes sir.

Q. Where is it?

A. I don't know—I suppose down to the shop. I don't know.

Q. Didn't you get a hook the next time that had three coils in it?

A. No, I think that if anything, we put that over once.

Q. Now, you know. I say, didn't you—a hook with three coils?

A. No, I say I think it is only once.

Q. It isn't a question of thinking—you know, of course you know. Now did you or did you not?

A. I say that I think it only come over once.

Q. I don't say you think—I say, Mr. Shepard, you must necessarily know what is the fact.

A. No, I don't necessarily know.

Q. Do you know what kind of a hook you substituted for this one?

A. I have a general recollection.

Q. What?

A. I have a general recollection. That is my recollection.

Q. You pretend to say that you don't know whether you introduced three coils or not?

A. I think there was only two.

Q. That has only one.

A. That has one. I think we brought it over once more.

Q. That was safer?

A. I don't know whether it was or not.

Q. You thought so, or else you wouldn't have put on another coil.

A. We wouldn't have put it around again?

Q. I say you thought so, or you wouldn't have put on another coil.

A. I don't remember whether I had that made. I don't remember who gave instructions for making that other hook."

Didn't know what became of the old hook. Was nearly night after the accident when he got there. The hook was then on the cable.

Q. "Don't you know—didn't you hear your employes testify they didn't use that any longer—didn't you? They waited until they got another—that they tied it up; They took the hook off, and tied the cable around the bucket until they got another one?

A. I don't think—the men weren't filling in. They didn't fill in any more until I came.

Q. You say you looked at the hook, and—I asked where it was. You said on the cable?

A. Yes sir, to the best of my recollection.

Q. You heard them say it was taken off, didn't you?

A. They took it off afterwards, didn't they?

Q. You heard the witness just preceding say it was taken off?

A. Yes sir.

Q. They lashed the cable to the bucket from that time on until another one was made, didn't you?

A. I heard that.

Q. Yet you say you came back that evening and you found the hook still on the cable?

A. I think so, I think it was still on the cable.

Q. Did you have it taken off?

A. No sir.

Q. Do you mean to say that you never had it taken off?

A. No sir.

Q. If it was taken off, it was taken off without any authority from you?

A. No sir.

Q. You didn't consider it was necessary to take it off?

A. Didn't have anything to do about it.

Q. What?

A. It is this way, if you will give me—

Q. Just answer the question, I say. You didn't deem it necessary to take the old hook off?

A. Of course I deemed it necessary to take the old hook off.

Q. Then why didn't you have it taken off.

A. It was gone the next morning when I went to work.

Q. That evening you say?

A. The men wasn't working when I got back—they hadn't worked any.

Q. You think the men themselves took it off and got another hook?

A. No, it was taken off the next morning, and the cable was fastened around the bail, and the hook dis-

appeared, and I don't know what became of it.

Q. Were you there when it was taken off the next morning?

A. No sir.

Q. When did you first discover it was taken off?

A. It was gone the next morning.

Q. What time?

A. Oh, when I came on the job—I can't remember just when.

Q. Did you say the hook was taken off then?

A. Yes sir.

Q. Did you make any remark about it to them?

A. I can't remember what I did.

Q. Did you ask them if they had gotten another hook, or ordered another hook?

A. You see we didn't have any use for another.

Q. Oh, please answer my question. Did you ask them if they had ordered another hook?

A. I couldn't say.

Q. You can't say, Mr. Shepard? You mean to say you don't remember?

A. No sir.

Q. Have you no recollection on that subject?

A. No sir.

Q. None at all?

A. I don't remember—

Q. Did you ask where the old hook was that was taken off?

A. I think that I made inquiry.

Q. You think you did make inquiry?

A. Yes sir.

Q. What did you learn?

A. I didn't learn anything.

Q. What?

A. I didn't learn anything.

Q. Couldn't learn anything about it?

A. No sir.

Q. Didn't that strike you as a little peculiar?

A. I don't know as I inquired what became of it.

Q. You just said you did. Now did you, or didn't you?

A. I wouldn't be certain whether I inquired what became of that hook or not, but naturally I would.

Q. Naturally you would, yes?

A. Yes.

Q. Quite naturally I should think?

A. Yes sir.

Q. Now what did you learn about it?

A. I didn't learn anything.

Q. Do you remember what—what was said about it at that time?

A. No sir.

Q. You have no recollection?

A. No sir.

Q. And you never concerned yourself about what became of that hook?

A. Yes sir.

Q. What?

A. Yes, sir.

Q. You did concern yourself?

A. Yes sir.

Q. When did you concern yourself about it?

A. I tried to find what became of it.

Q. When?

A. Immediately.

Q. That next morning?

A. I looked around, asked everybody what became of the hook.

Q. You remember that you did, don't you?

A. Yes sir.

Q. Didn't you tell the jury a moment ago that you didn't remember whether you did. You naturally did, but didn't remember whether you did or not?

A. Well, I remember it.

Q. Now remember it?

A. I remember it.

Q. You didn't remember a moment ago?

A. I was a little uncertain at the time.

Q. Now, you do remember that you inquired?

A. Yes sir.

Q. Of whom did you inquire?

A. The men working on the job.

Q. What ones?

A. I couldn't say which ones.

Q. What did they say?

A. They said they didn't know where it was.

Q. Didn't know where it was. Now you remember that distinctly, do you?

A. Yes sir.

Q. How does it happen that you didn't remember that a minute ago?

A. Well, it has been a long time ago.

Q. I know. But we have been talking about that

hook, and been talking about after it disappeared—talking about it this forenoon before the jury that you didn't produce that hook?

A. Yes.

Q. And didn't you try to refresh your memory, to remember where that hook was when you came on the witness stand?

A. Yes, I refreshed my memory.

Q. But you were never able to refresh your memory as to what the facts were until this minute?

A. Yes sir.

Q. This is the first time it has come back to you.

A. If you will let me explain.

Mr. LONERGAN: Go ahead and explain, Mr. Shepard, anything that you want.

Q. Glad to have you.

A. When you brought up there questioning the witness about whether it wasn't a fact that I instructed him to take the hook off, and bring it to the shop, and deliver it to Mr. Greene, it set me—that set me to thinking, and I can't remember of ever giving any such instructions, or anything of the kind, but I could remember that I talked the next morning; I tried to find out where that hook was.

Q. You could remember that?

A. I remember that fact, yes sir.

Q. When did you first remember that?

A. Well, I couldn't say exactly.

Q. You remembered it while you were sitting here in the courtroom and after that subject came up?

A. Possibly.

Q. What?

A. Yes sir.

Q. Remembered it before you went on the witness stand?

A. Well, I might have, yes sir.

Q. You think you did?

A. I think I did.

Q. Why did you say then, since you have been on the witness stand, just a moment or two ago, that you couldn't recall whether you made any inquiry at all about it, or not? Might have done it, or would have been natural, but couldn't recall you did.

A. Well, a man on the witness stand with somebody firing questions at him, isn't perfectly at ease you know—might get a little rattled.

Q. A man ought to be able to tell the truth?

A. Yes sir.

Q. Whether he is at ease or not, oughtn't he?

A. Yes sir.

Q. Now, Mr. Shepard, do you state that you have no idea—you stated to this jury that you have no idea now where this hook is?

A. I do not.

Q. Havn't the slightest idea in the world?

A. No sir.

Q. Didn't it occur to you as a little strange that it had disappeared there so suddenly that morning?

A. I don't know whether it did or not.

Q. Well now, Mr. Shepard, you do know whether it did or not. You do know whether it occurred to you as being a strange incident that that hook should

have disappeared so suddenly. You do know whether it so appeared to you?

To which question counsel for defendant objected as being immaterial, which objection was overruled by the Court, who held that it is proper to attempt to account for the hook. To which ruling defendant then and there excepted, which exception was allowed, and the witness further testified:

Q. I say you do know that?

A. What is the question.

Q. Well, I asked you if it didn't occur to you as being a little strange that that hook should have disappeared so suddenly. You said you didn't know whether it did occur to you or not.

A. It so appears now.

Q. It does now appear to you a little strange?

A. It appears strange to me.

Q. It didn't occur to you then?

A. I presume it did.

Q. Then didn't you make a very earnest search for it?

A. I made all the search I could.

Q. How much search did you make?

A. By asking the men and looking around.

Q. When did you have this one made?

A. I had it made when the case was set for trial, I think about a month ago.

Q. Now, Mr. Shepard, isn't it a fact that you took that old hook down and put it in your safe?

A. No sir.

Q. In the office?

A. No sir.

Q. Who did do it?

A. I don't know, and I don't know that anybody did.

Q. You never heard of it being there?

A. No sir.

Q. Never heard of the old hook being safely put away?

A. No sir, I never did.

Q. You know it wasn't used any more after this accident?

A. I never saw it since.

Q. And you have never seen it since?

Mr. LEITER: If we had the hook Mr. Fulton, we would certainly have it here.

Mr. FULTON: Of course I am not disposed to question your word, Mr. Leiter.

Mr. LEITER: Thank you.

Mr. FULTON: And you are not responsible for the hook being away."

After the accident, Luck worked the same as he always did, including digging down in the well. Never dug as much as the rest of the men because he didn't have time. He was superintending the whole job. Occasionally would take a shift at digging. Luck hired and discharged men that were sent from the employment office. Can't say what men he employed or discharged. Hanson's agency had instructions from Shepard to send men when the foreman telephoned to him. Considers that hiring men by Luck. Told Hanson to send the men up and what wages they

were to get. The men reported to Luck.

On re-direct examination the witness testified as follows:

Luck had all authority as to the men sent up by the employment agency. He could reject or accept them as he wanted to. Has not seen the hook since the night of the accident, and no one has ever told him what became of the hook or that he knew where the hook is or was. The hook introduced as an exhibit was made by a blacksmith under Mr. Bristow's description. The hook used on the Y. W. C. A. building was a part of Mr. Hyde's equipment taken over along with other equipment on the job. The hook made by Hyde was the one in use at the time Luck was injured, and was sent up to Olds, Wortman & King's building by the witness. The hook had also been used on the Y. M. C. A. job and returned to the shop from there and afterwards sent to the Olds, Wortman & King building.

R.W. GREENE, being recalled, testified that the hook in use at the time of the accident was never in his possession; that he never saw the hook or had it in his possession after the accident, and that he never locked the hook in the office safe.

Whereupon, the defendant rested.

C. N. LUCK, re-called in rebuttal, testified as follows:

Shepard never said anything to him in the way of instructions to have the hook wired, and never heard of his giving any such instructions. That he never went down any of the wells after he was injured; nev-

er did any physical labor upon going to work after the accident. Never even took his coat off. Shepard told him that he didn't have to do anything; that if he would come back Shepard would, if he had to, furnish an easy chair if Luck wanted to sit down to run the job. Never ordered any machinery or appliances. The casing handle and the spider were used on the Y. W. C.A. job two years before. Shepard brought them up in the buggy himself.

After the accident, on the garage at Union Avenue and Davis Street when Shepard sent him there with one helper and he wasn't able to do the work the witness told Shepard he would have to send more men there. Shepard remarked that the job would cost too much then; that two men were supposed to do the work. Next morning Shepard sent two more men. When the job was done Shepard told him he had better go and get rested up and come back when he got well. The bail on the bucket was either five-eighths or three-fourths. That hook would have to be spread to get that bail on. Plaintiff's Exhibit "D" was nothing like the hook in use at the time of the accident.

On cross-examination the witness testified that he did not work in the shop after the East Side Garage job. Shepard told him that the spider had been used on the Y. W. C. A. building.

JACK ELIA, called as a witness in rebuttal, testified that he was on the job when Luck came back after the injury. That up to the time Elia was discharged by Shepard he did not see Luck do any work around there. Worked there two or three weeks aft-

er Luck returned. During that time Luck did no physical work. Witness was discharged by Shepard while still on the Olds, Wortman & King job.

Whereupon plaintiff rested.

Whereupon counsel for defendant moved the Court for a directed verdict, upon the grounds that the plaintiff has not shown any negligence on the part of the defendant; that the plaintiff assumed the risk of the injury, particularly insofar as the hook is concerned; that having authority to select the appliances, even if the accident were due to defective appliances, plaintiff was guilty of contributory negligence in failing to select a proper appliance, and that the accident was due to the improper manner in which the bail was attached to the hook, being the negligence of a fellow-servant.

Whereupon the Court overruled defendant's motion for a directed verdict, to which ruling defendant then and there excepted, which exception was allowed.

Whereupon, after argument of counsel, the Court instructed the jury as follows:

INSTRUCTIONS OF THE COURT TO THE JURY.

"Gentlemen of the Jury: This action is brought by Mr. Luck against the Otis Elevator Company to recover damages for an injury received by him which he charges was due to the negligence and want of care of the defendant company. The charge in the complaint, and upon which he bases his right to recover, is that the company negligently and carelessly

failed to provide a reasonably safe hook with which a bucket was attached to a cable at the time it was being lowered into a shaft or well where he was at work, and by reason of which fact, the bucket slipped from the hook and fell, and struck and injured him. The defendant denies the negligence charged. In other words, it denies that it neglected to furnish a reasonably safe hook. It says further that the bucket did not fall because of the condition of the hook, but by reason of the fact of the man working at the top of the shaft negligently and carelessly attached the bucket to the hook, and that it slipped from the hook on account of the manner in which it was fastened, rather than from a defect in the hook. Second, it says that Mr. Luck was in charge of the work at the time of the accident, and that it was part of his duty to provide or see that a suitable hook was provided, for use in lowering this bucket, and that it furnished suitable hooks and material for that purpose, and left to Mr. Luck the duty of selecting the character of hook to be used, and that, with that duty, he chose to use this particular hook when he could have provided, as they say, a suitable hook, if this one was not suitable, and that by reason of that fact, he was injured through his own fault and negligence in not doing what he was authorized to do by his terms of employment. They say, third, that the danger, if there was any danger from the use of this hook, was known to Mr. Luck, or that it was so obvious and apparent that he ought to have known it as a reasonable man, and therefore when he continued to work in this shaft and

use this hook, or where this hook was being used, without objection and without protest on his part, he assumed the dangers from the use of this implement, and couldn't recover against the defendant on account thereof.

Now, this constitutes the issues in this case, and the first question for you to determine will be, whether or not the hook in use at the time of this accident, and to which this bucket was attached, was reasonably suitable and proper for the purposes for which it was being used. The law is, that an employer is required to exercise reasonable care and diligence to provide his employee or employes with reasonably suitable tools and appliances to work with, and it was therefore the duty of the defendant in this case to exercise reasonable care and caution to provide suitable appliances with which to handle this bucket, and if it did not do so, and by reason of that fact, the bucket fell and injured the plaintiff without any fault on his part, it would be liable to him for such injury. Now what constitutes reasonable care and caution depends upon the circumstances of each case. The standard is, what would a reasonably prudent man have done under the same circumstances, and, therefore, the test will be whether or not a reasonably prudent person in charge of work of that character—of the character in which the plaintiff was engaged at the time of his injury, would have provided a hook of the kind and character in use at that time, and if he would, and the defendant's conduct measured up to this standard, then it discharged its duty and would not be liable

for an accident that might have occurred without its fault. The defendant was not, and no employer is an absolute insurer of the safety of his employees. He is under no obligation to respond in damages to a man in his service who is injured unless he himself is at fault. Accidents may happen, and are likely to happen at any time without fault of anybody, and for such accidents, an employer is not liable. Nor is negligence to be imputed or inferred from the mere fact of the accident, but the burden is on the plaintiff in this case to show by a preponderance of testimony that the hook in use at the time of this accident was not suitable and proper under the rule, substantially as I have given it to you. In other words, that it was not such a hook as a reasonably prudent man would have provided under the circumstances for use in that character of business. If you find that it was such a hook, then of course this case is ended, and your verdict would be in favor of the defendant.

If, on the other hand, you find that it was not a suitable hook, then it will be necessary for you to consider the other questions that I have suggested to you. It is claimed by the defendant that Mr. Luck, as I said, was in charge of the work, and that he had authority under his employment to provide these instrumentalities, and that it furnished suitable material from which hooks could be made, or suitable hooks, and left it to Mr. Luck's judgment as to the kind and character that should be used in the work. If it did that, and if that was the relationship of the parties, then Mr. Luck could not recover against it, because

of a defective hook that he himself used when he had a right, and could have selected or procured another. If the company furnished suitable materials,—suitable hooks, or suitable materials with which to make hooks—and left the question to Mr. Luck's judgment, as to the kind and character to be used, then it discharged its duty, and he will have no cause to complain if he was injured because of the character of hook that he voluntarily used. But unless he was charged under his employment with this duty, then it makes no difference whether he was a foreman or a common laborer, because the obligation of an employer to furnish, when he assumes to do so, his foreman with reasonably safe tools and appliances, to work with, is just the same as any other workman, and the relationship of Mr. Luck and the defendant in this connection only becomes important in determining whether he himself had authority to make selection of this hook, or instrumentality.

If he had, whether he was a foreman or a common laborer, and he chose a defective hook or chose to use a defective hook, when he had a right to procure another and suitable one, he would have no cause of action against the company whether a foreman or common laborer. On the other hand, if he was not charged with that duty, did not have that right, then it makes no difference whether he was a foreman or a laborer, because the company owed him just exactly the same duty, regardless of his grade of employment.

Then, another question. It is said in this case, and claimed by the defendant, that this accident occurred

through the negligence or carelessness, as I suggested, of the man at the top of the shaft who attached the bucket to the hook; in other words, that the bucket fell, not because of a defective hook, but because of the careless manner in which it was attached, and if that was true then the company would not be liable to Mr. Luck for his injury, because the negligence would not be that of the company, but would be that of a fellow servant, a man working with him and for which the company would not be liable.

Third. It is claimed that because this hook had been in use for some considerable time on this work, and that Mr. Luck knew that fact, he is chargeable—or that he assumed the risk of damage or injury to himself, from the use of that hook. Now, unless Mr. Luck was charged with the duty, or had the authority, to provide this hook and instrumentality for lowering this bucket, he had a right to presume that the company had discharged its duty and exercised reasonable care in providing instrumentalities, and he did not assume the risk of using this instrumentality unless he knew that they were unsafe and improper, and appreciated the danger from using them, or unless the danger was so obvious and apparent, that any reasonable man would have refused to work in the well where this bucket was being lowered, or would have complained to the company on account of the defective hook.

There has been evidence introduced tending to show that some time before this accident, and while this same hook and line were being used in lowering

a bucket into the elevator shaft, that the bucket fell and struck one of the workmen. That evidence is only proper, and could only be considered by you for the purpose or as it may bear upon the question as to whether the hook was a safe and proper hook. There is no evidence here that the defendant company knew of that accident, or was advised of it—no direct evidence that it knew of that accident or was advised of it, and the evidence could only be considered as it may bear upon the question as to whether the hook was a defective one or not.

There is also testimony in this case from one witness for the defendant to the effect that Mr. Luck was advised some time before this accident, that this hook ought to have been wired to the bucket and he was directed not to use the bucket without wiring the hook. Now, there is a conflict in the testimony upon that subject. The superintendent of the company, as I remember, testified that he told Mr. Luck that they ought not to use this hook for lowering the bucket without wiring the hook to the bucket, or else take the hook off and clamp the cable on. Mr. Luck denies that, and that is a question of fact for you to determine from the testimony. Of course if Mr. Luck was advised by the superintendent not to use this hook in the manner in which he did, but to wire it on, and he had authority to do that, and regardless of that advice, and regardless of the directions, he went on and used the hook in the manner in which he did, and was injured, then it was his own fault, and not the fault of the company. But it is a question of fact for you

to determine where the truth lies in reference to that statement, and I think it is fair, in considering that question, for you to consider the probabilities of the case—whether it is probable that a man working in a well three feet wide in one direction and three and a half feet in another, with a bucket descending loaded with soil, weighing from 400 to 500 pounds, would have neglected to follow the instructions which affected his own safety if he had been advised that the hook was unsafe, and had been directed to wire it to the bail, or take it off the cable and fasten the cable in some other way. And in considering this question, I think you have a right to consider the probabilities of the case, and to say whether a reasonable man would have worked under such a bucket when he had been advised that it was unsafe and improperly fastened.

Now, you are the judges of all questions of fact in this case. You are the judges of the credibility of the witnesses. Every witness is presumed to speak the truth. But this presumption, however, may be overcome by the manner in which the witness testified, by his appearance on the witness stand, by the character of his testimony, and you are to determine whether a witness who has testified to a thing has told the truth, and the weight to be given to the testimony.

Now, in the event that the defendant is liable in this case, and should respond in damages to the plaintiff, under the law as I have given it to you, and the testimony as given here from the witness stand, then it will be necessary for you to determine the amount of

damages which he shall recover. Upon that question there is no fixed rule which the Court can state to you. It is a matter necessarily left to the sound judgment and discretion of the jury, the object to be attained is compensation. The purpose in awarding damages, is to compensate the damaged plaintiff in dollars and cents for his injury, but in the very nature of things, it is impossible to lay down any certain definite rule or standard by which an injury can be measured in dollars and cents, so that it is important and necessary for a jury to consider the evidence, and all the evidence in the case, and to determine as nearly as it can what would be fair—what is a fair, just compensation for the injury sustained. In doing that, you have a right in this case, and it is your duty, if you reach that stage of the case, to consider the nature and character of this injury, whether it is temporary, whether it is probably permanent, how, if any, it affects the plaintiff's earning capacity, his physical condition before and since the accident, his ability to earn money,, and his impaired ability since, if any, and his physical suffering that he may have sustained on account of the injury, and from all these facts arrive at as just and fair conclusion as you can under the circumstances of the case. Of course it is needless to say to you that this case, like all cases, must be tried upon the facts and law as given here, and without reference to the parties. You have no right to find a verdict in favor of the plaintiff because of sympathy for him, unless you think the defendant is liable, and you would have no right, if you think the defendant is liable, to increase

your verdict because of any sympathy you may have for the plaintiff. You are to determine the amount you think is just and fair compensation for his injuries.

Whereupon, it is now certified that the Court instructed the jury as follows:

“There has been evidence introduced tending to show that some time before this accident, and while this same hook and line were being used in lowering a bucket into the elevator shaft, that the bucket fell and struck one of the workmen. That evidence is only proper, and could only be considered by you for the purpose or as it may bear upon the question as to whether the hook was a safe and proper hook. There is no evidence here that the defendant company knew of that accident, or was advised of it—no direct evidence that it knew of that accident or was advised of it, and the evidence could only be considered as it may bear upon the question as to whether the hook was a defective one or not.”

To which instruction the defendant, in the presence of the jury, and counsel, and before the jury retired, duly excepted, which exception was allowed.

WHEREUPON, it is now certified that the defendant, before the argument of said cause to the jury was begun, duly requested the Court in writing to give to the jury on its behalf the following instructions:

“If you find that defendant was negligent as charged in the complaint, before plaintiff can recover in this action, you must further find that defendant’s negligence was the proximate cause of the accident;

that is—that cause which conduced directly to the accident, and without which the accident would not have occurred.”

“I instruct you that plaintiff assumed the ordinary risk and dangers incident to his employment, and if you find from the evidence that the risk of the bucket becoming dislodged from said hook while being lowered into the well was a risk and hazard incident to plaintiff’s employment, then I instruct you that such risk was assumed by him, and he cannot recover.”

“I also instruct you that plaintiff assumed such risks in and about his employment as were open and obvious. An open and obvious risk is one that is instantly observed and appreciated by a person of ordinary intelligence. If you find from the evidence that the risk and danger of the bucket becoming unfastened from the hook as the same was being lowered into the well, was such an open and obvious risk as would be immediately observed and appreciated by a person of ordinary intelligence, then I instruct you that plaintiff assumed said risk and he cannot recover in this action.”

“If you find from the evidence that at the time of receiving his injury, plaintiff was just as well aware as his employers, of the condition of said hook, and the use to which the same was put, and of the dangers of working around the same, or if you find that by reason of his being in and about, and in close proximity to said hook for a considerable period of time, he had equal means with, or better opportunities than, the defendant, to discover that said hook was an un-

suitable appliance, and that the danger of working there under such conditions was open and could have been discovered by the plaintiff by the use of ordinary care, then I instruct you that plaintiff cannot recover, and your verdict should be for the defendant."

It is certified that the Court in his charge to the jury, did not give to the jury said instructions in the form as above requested.

WHEREUPON, after the Court had instructed the jury as hereinbefore certified, on pages 49 and 52, inclusive, of this Bill of Exceptions, and before the jury retired, the following colloquy between Counsel and Court took place:

"Mr. LEITER: I simply desire to make exception to give the defendant's requested instructions in the form asked, and specify specifically an exception to that instruction given by your Honor, relative to the other accident—falling of the bucket on another job.

COURT: I think I have given in substance the instructions I intended to.

Mr. LEITER: I have not been able to check them up entirely, and for that reason desire an exception."

WHEREUPON, the Court allowed said exception.

WHEREUPON, the said jury retired to consider their verdict, in charge of an officer duly sworn, as by law provided, and after due deliberation returned into Court a verdict in favor of plaintiff and against the defendant in the sum of Seven Thousand (\$7,000.00) Dollars.

WHEREUPON, on the fifteenth day of March,

1912, judgment was entered on the verdict in favor of the plaintiff and against the defendant in the sum of Seven Thousand (\$7000.00) Dollars and \$94.90 Dollars, costs and disbursements.

WHEREUPON, the defendant was allowed to and including the 8th day of May, 1912, in which to tender its Bill of Exceptions herein.

WHEREUPON, the Court now being willing to preserve the record, in order that its rulings may be reviewed for error, if any there be, now hereby certifies that the foregoing Bill of Exceptions contains all the evidence offered or admitted on behalf of either party, together with all the rulings of the Court during said trial, and exceptions taken, or allowed, and the Court hereby refers to and incorporates and makes a part of this Bill of Exceptions Plaintiff's Exhibits "1", "2" and "3", and Defendant's Exhibits "A", "B" and "C", and the Court hereby further certifies that the said Bill of Exceptions was presented within the time allowed by this Court, and by law, for the filing and presentation of the same.

WHEREUPON, this Bill of Exceptions is now settled certified and signed, this 13 day of May, 1912.

R. S. BEAN,

Judge of Said Court,

The within Bill of Exceptions was tendered this 25th day of April, 1912.

R. S. BEAN,

Judge.

And afterwards, to-wit, on the 13 day of May, 1912, there was duly filed in said Court, a Petition for

Writ of Error in words and figures as follows,
to-wit:

[Petition for Writ of Error.]

*In the District Court of the United States for the
District of Oregon.*

CHRISTIAN LUCK,

Plaintiff,

vs.

OTIS ELEVATOR COMPANY,

Defendant.

Otis Elevator Company, defendant in the above entitled cause, feeling itself aggrieved by the verdict of the jury, and the judgment in the above entitled action, entered on the fifteenth day of March, 1912, for the sum of Seven Thousand (\$7000.00) Dollars and ninety-four and 90-100 (\$94.90) Dollars, costs and disbursements, in favor of plaintiff and against the defendant, comes now, by its attorneys, Griffith, Leiter and Allen, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error, and your petitioner will ever pray.—

GRIFFITH, LEITER & ALLEN,

Attorneys for Defendant.

R. S. BEAN,
Judge.

C. W. FULTON,
Attorney for Plaintiff.

A. M. CANNON,
Clerk.

*In the District Court of the United States for the
District of Oregon.*

Now, on this day, this cause comes on to be heard upon the petition of the defendant, Otis Elevator

Company for a writ of error, and for the allowance thereof. Said defendant appearing by its attorneys, Griffith, Leiter and Allen, and it appearing to the Court that the said defendant has filed its petition for a writ of error herein, and has therewith filed its assignment of errors.

It is ordered that said writ of error be, and the same is hereby allowed, and that a citation issue and be served as by law provided.

It is further ordered that the amount of the bond to be given by the said defendant, Otis Elevator Company, be fixed at the sum of Nine Thousand (\$9,000.00) Dollars, with good and sufficient surety to be approved by the Court, and that such bond when so filed shall operate as a supersedas bond in said cause, which being now filed, with American Surety Company of New York as Surety, is hereby approved.

Dated May 13, 1912.

R. S. BEAN,
Judge.

And afterwards, to-wit, on the 13 day of May, 1912, there was duly filed in said Court, Assignments of Error, in words and figures as follows, to-wit:

[Assignments of Error.]

*In the District Court of the United States for the
District of Oregon.*

CHRISTIAN LUCK, Plaintiff,

vs.

OTIS ELEVATOR COMPANY, Defendant.

Comes now the defendant, Otis Elevator Company, a corporation above named, and in connection with its

petition for a writ of error in the above entitled action, alleges that there was error on the part of the District Court of the United States for the District of Oregon in regard to the matters and things hereinafter set forth, and the defendant thereupon makes this, its assignment of errors:

I.

The Court erred in permitting counsel for plaintiff to introduce in evidence, over defendant's objection and exception, the picture from Gray's Anatomy.

II.

The Court erred in permitting counsel for plaintiff to ask, and in permitting the witness, A. G. Bettman, to answer, over the objection and exception of defendant, the following questions:

"Q. How will it affect any nerve centers, or nerves of the body?

A. Well, pressure would affect the cord. At present there seems to be no pressure on the cord."

III.

The Court erred in permitting counsel for plaintiff to ask the witness H. A. Taylor, and in permitting said witness to answer over defendant's objection and exception, the following question:

"Q. Now, while you were working there in the well, state whether or not any accident occurred, and if so, what?

A. A bucket fell 53 feet there."

IV.

The Court erred in permitting council for plaintiff

to ask the witness H. A. Taylor, and said witness to answer, over the objection and exception of the defendant, the following question:

“Q. Never mind what he said. I understand you had a talk also with Mr. Shepard about the injury you received at that time. Did you have any talk with him about the injury you received at that time?”

A. The injury that I received at that time—I told Mr. Shepard at the time that I wanted to be sure the man understood how to hook the hook in there. I didn’t like to go in the shaft and put my life in danger at the bottom of that shaft with a man who didn’t know anything about the hook.”

V.

The Court erred in overruling the motion made by defendant that all the testimony of the witness H. A. Taylor in regard to the falling of the bucket be stricken out, because Counsel for plaintiff had failed to show that defendant had any knowledge of the occurrence.

VI.

The Court erred upon the trial of said cause in overruling the motion of defendant for a directed verdict made at the close of all the evidence admitted upon the trial of said cause upon the grounds that plaintiff had not shown any negligence on the part of the defendant; that the plaintiff assumed the risk of the injury, particularly insofar as the hook was concerned; that having authority to select the appliances, even if the accident were due to defective appliances, plaintiff was guilty of Contributory negligence in failing to

select a proper appliance and that the accident was due to the negligence of a fellow-servant.

VII.

The Court erred in instructing the jury as follows:

“There has been evidence introduced tending to show that some time before this accident, and while this same hook and line were being used in lowering a bucket into the elevator shaft, that the bucket fell and struck one of the workmen. That evidence is only proper, and could only be considered by you for the purpose or as it may bear upon the question as to whether the hook was a safe and proper hook. There is no evidence here that the defendant company knew of that accident or was advised of it—no direct evidence that it knew of that accident or was advised of it, and the evidence could only be considered as it may bear upon the question as to whether the hook was a defective one or not.”

VIII.

The Court erred in refusing to instruct the jury at the request of the defendant as follows:

“If you find that defendant was negligent as charged in the complaint, before plaintiff can recover in this action, you must further find that defendant’s negligence was the proximate cause of the accident, that is—that cause which conduced directly to the accident, and without which the accident would not have occurred.”

IX.

The Court erred in refusing to instruct the jury at the request of the defendant as follows:

"I instruct you that plaintiff assumed the ordinary risks and dangers incident to his employment, and if you find from the evidence that the risk of the bucket becoming dislodged from said hook while being lowered into the well was a risk and hazard incident to plaintiff's employment, then I instruct you that such risk was assumed by him, and he cannot recover."

X.

The Court erred in refusing to instruct the jury at the request of the defendant as follows:

"I also instruct you that plaintiff assumed such risks in and about his employment as were open and obvious. An open and obvious risk is one that is instantly observed and appreciated by a person of ordinary intelligence. If you find from the evidence that the risk and danger of the bucket becoming unfastened from the hook as the same was being lowered into the well, was such an open and obvious risk as would be immediately observed and appreciated by a person of ordinary intelligence, then I instruct you that plaintiff assumed said risk and he cannot recover in this action."

XI.

The Court erred in refusing to instruct the jury at the request of the defendant as follows:

"If you find from the evidence that at the time of receiving his injury, plaintiff was just as well aware as his employers, of the condition of said hook, and the use to which the same was put, and of the dangers of working around the same, or if you find that by reason of his being in and about, and in close proxim-

ity to said hook for a considerable period of time, he had equal means with, or better opportunities than, the defendant, to discover that said hook was an unsuitable appliance, and that the danger of working there under such conditions was open and could have been discovered by the plaintiff by the use of ordinary care, then I instruct you that plaintiff cannot recover and your verdict should be for the defendant."

XII.

The Court erred in entering judgment in said cause in favor of the plaintiff and against the defendant for the sum of Seven Thousand (\$7000.00) Dollars.

Dated May 13, 1912.

GRIFFITH, LEITER & ALLEN,

Attorneys for Defendant.

DISTRICT OF OREGON,

County of Multnomah—ss.

Due service of the within assignment of errors is hereby accepted in Multnomah county, Oregon, this 13 day of May, 1912, by receiving a copy thereof certified to as such by R. A. Leiter, of attorneys for defendant.

C. W. FULTON,

Attorney for Plaintiff.

[Endorsed]: Assignment of Errors. Filed May 13, 1912.

A. M. CANNON,

Clerk.

And afterwards, to-wit, on the 13 day of May, 1912, there was duly filed in said Court, a Bond in words and figures as follows, to-wit:

[Bond on Writ of Error.]

*In the District Court of the United States for the
District of Oregon.*

CHRISTIAN LUCK, Plaintiff,

vs.

OTIS ELEVATOR COMPANY, Defendant.

KNOW ALL MEN BY THESE PRESENTS, that we, OTIS ELEVATOR COMPANY, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, as Principal, and AMERICAN SURETY COMPANY of NEW YORK, as Surety, are held and firmly bound unto Christian Luck, in the sum of Nine Thousand (\$9,000.00) Dollars, to be paid to the said Christian Luck, for the payment of which, well and truly to be made, we bind ourselves and each of us, and our and each of our successors and assigns, jointly and severally, freely by these presents.

Sealed with our seals and dated the day of May, A. D., 1912.

WHEREAS, the above named Otis Elevator Company has applied for and obtained a writ of error to the United States Court of Appeals for the Ninth Circuit, to reverse the judgment rendered in the above entitled cause by the Circuit Court of the United States for the District of Oregon.

NOW, THEREFORE, the condition of this obligation is such that if the above named Otis Elevator Company shall prosecute said writ to effect, and assume all damages and costs if it shall fail to make good its plea, then this obligation shall be void, other-

wise the same shall be and remain in full force and virtue.

OTIS ELEVATOR COMPANY,
By Griffith, Leiter & Allen, its Attorneys.
AMERICAN SURETY COMPANY of NEW
YORK,

By W. L. Page,
Resident Vice President.
Attest: A. EDWARD KRULL,
Agent.

(Seal.) A. Edward Krull,
Resident Ass't Secretary.

The within board is hereby approved this 13 day of
May, 1912.

R. S. BEAN,
Judge.

[Endorsed]: Bond on Writ of Error. Filed May
13, 1912.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 13 day of May, 1912,
there was duly filed in said Court, a Writ of Er-
ror, in words and figures as follows, to-wit:

[Writ of Error.]

*In the United States Circuit Court of Appeals for the
Ninth District.*

OTIS ELEVATOR COMPANY, a corporation,
Plaintiff in Error,

vs.

CHRISTIAN LUCK, Defendant in Error.

THE UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES
OF AMERICA.

To the Judges of the District Court of the United
States for the District of Oregon:

GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable R. S. Bean one of you, between Christian Luck, Plaintiff and Defendant in Error, and Otis Elevator Company, a corporation, Defendant and Plaintiff in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceeding aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

(Seal) A. M. CANNON,
Clerk of the District Court of the United States for
the District of Oregon.

And afterwards, to-wit, on the 13 day of May, 1912,
there was duly filed in said Court, Citation on
Writ of Error, in words and figures as follows to-
wit:

*In the District Court of the United States for the
District of Oregon.*

OTIS ELEVATOR COMPANY, Defendant.

To Christian Luck, and to C. W. Fulton, his attorney;—Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the

District Court of The United States for the District of Oregon wherein Otis Elevator Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, in said District, this 13th day of May, A. D., 1912.

R. S. BEAN,
Judge.

DISTRICT OF OREGON,
County of Multnomah—ss.

Due service of the within citation on writ of error is hereby accepted in Multnomah county, Oregon, this 13th day of May, 1912, and admitted to have been made upon me and upon plaintiff.

C. W. FULTON,
Attorney for Plaintiff.

[Endorsed]: Citation on writ of error. Filed May 13, 1912.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on Monday, the 13 day of May, 1912, the same being the 61 Judicial day of the Regular March, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order to Certify Up Exhibits.]

*In the District Court of the United States for the
District of Oregon.*

CHRISTIAN LUCK,

No. 3815,

v.

OTIS ELEVATOR COMPANY. June 4, 1912.

Now, at this day, it appearing that certain exhibits introduced on the trial of this cause in this court are of such character as to require the inspection thereof by the United States Circuit Court of Appeals on the writ of error from that court.

IT IS THEREFORE ORDERED, that plaintiff's Exhibits 2 and 3 and defendant's Exhibits A. B. C and D be transmitted by the clerk of this court, with the record of this cause, to the said United States Circuit Court of Appeals for the Ninth Circuit.

CHAS. E. WOLVERTON,

Judge.

No. 2157

**In the United States
Circuit Court of Appeals
Ninth Circuit**

OTIS ELEVATOR COMPANY

Plaintiff in Error

vs.

CHRISTIAN LUCK

Defendant in Error

Brief of Plaintiff in Error

**Upon Writ of Error from United States District Court
for the District of Oregon**

GRIFFITH, LEITER & ALLEN

Attorneys for Plaintiff in Error

C. W. FULTON

Attorney for Defendant in Error

FILED

**In the United States
Circuit Court of Appeals
Ninth Circuit**

OTIS ELEVATOR COMPANY

Plaintiff in Error

vs.

CHRISTIAN LUCK

Defendant in Error

Brief of Plaintiff in Error

**Upon Writ of Error from United States District Court
for the District of Oregon**

STATEMENT OF THE CASE.

This is an action for personal injuries, brought by the defendant in error. For purposes of convenience we shall, throughout this brief, designate the parties hereto as they appeared in the District Court.

The basis of plaintiff's right of action as found in his complaint in substance is, that on the 24th day of February, 1912, plaintiff was employed by defendant to assist in the installation of a plunger elevator, in a building in the city of Portland, Oregon; that in the installation of this elevator it was necessary to

dig a well some 86 feet in depth and to construct therein a casing; that after such casing was placed in such well and carried up from the bottom it was necessary to fill the well around said casing with earth and gravel, let down into the well by means of an iron bucket attached to a cable; that as this bucket would be lowered into the well it would swing from side to side and strike the sides of the well, or of the casing, and unless securely fastened to said cable said bucket would be thrown off and separated from said cable; that defendant carelessly and negligently used, for the purpose of attaching the bucket to the cable, an unsuitable and unsafe iron hook, which permitted the bucket, when striking against the casing or well, to slip off from said hook; that as a result of defendant's negligence in using a hook of such character the bucket slipped off the hook and fell upon plaintiff, who was working in the well.

In its answer, defendant denied all of the material allegations of the complaint. Its first affirmative defense was that plaintiff was a foreman in charge of the men on this work, and also in charge of the tools, instrumentalities and appliances used therein; that as foreman, it was part of his duty to inspect the instrumentalities and appliances and to see that the same were in good condition and repair, and safe and suitable for the work; that defendant had in stock a number of hooks and other devices suitable for fastening said bucket, from which plaintiff could, and it

was his duty to, select a suitable hook, and that plaintiff did select the hook in use at the time of the accident; that if said hook was a defective or improper appliance, plaintiff himself was negligent in selecting and using, or permitting the same to be used, and that he was guilty of contributory negligence in said respect.

The second affirmative defense was the negligence of a fellow servant, in that the bucket was carelessly and negligently fastened on to the hook without being wired, and that it was permitted to fall, by reason of the negligent manner in which the bucket had been fastened by plaintiff's fellow servants.

The third affirmative defense was plaintiff's assumption of risk; that he was thoroughly familiar with the hook in use, fully understood that the bucket, fastened by means of said hook to the cable, would swing from side to side and strike the sides of the well and the casing, and understood the likelihood of the bucket, in so swinging and striking, to be separated from the cable, and thoroughly understood and appreciated the hazards and dangers of performing his work under such circumstances and conditions with the appliances then in use.

The affirmative defenses were put in issue by plaintiff's reply, and on March 15, 1912, a jury returned into court a verdict for the plaintiff in the sum of \$7,000. Defendant brings the case to this court on writ of error.

At the conclusion of all of the testimony offered by the parties, defendant moved the trial court for a directed verdict, on the ground that under the testimony plaintiff assumed the risk. (Transcript of Record, p. 113.) The motion was denied.

During plaintiff's case in chief the court permitted witness H. A. Taylor, over defendant's objection, to testify in regard to an accident which happened during October or November, 1908, on another job, and also denied defendant's motion to strike said testimony (Transcript of Record, pp. 70 to 74); and in instructing the jury permitted the jury to consider said testimony as bearing upon the question as to whether the hook was a defective one or not. (Transcript of Record, pp. 118, 119.)

The court also declined to give certain instructions requested by the defendant, which are assigned as error. (Transcript of Record, pp. 131 to 133.)

SPECIFICATIONS OF ERRORS

WITH

POINTS AND AUTHORITIES.

I.

The court erred in overruling defendant's motion for a directed verdict on the ground that plaintiff assumed the risk.

Assignment of Error, No. VI, Transcript of Record, pp. 130, 113.

(a) A servant assumes the ordinary risks incident to his employment.

Chicago etc. Co. v. Shalstrom, 195 Fed., 725, 728.

Puget Sound Elec. Ry. Co. v. Harrigan, 176 Fed., 488, 491.

This includes the assumption not only of those which he knew, but also of those which he might, in the exercise of reasonable care, have discerned.

Puget Sound Elec. Co. vs. Harrigan, 176 Fed., 488, 491.

(b) He also assumes the extraordinary risks and dangers which he knows and appreciates.

Chicago etc. Co. v. Shalstrom, 195 Fed., 725, 728.

Hull v. Northern Pac. Ry. Co., 136 Pac., 153, 155.

(c) And when a defect in an appliance is known to the employe or is so patent and obvious as to be readily observable to him in his work, he assumes the risk thereof by continuing in his employment.

Katalla Co. v. Rones, 186 Fed., 30, 33-4.

Chicago etc. Co. v. Shalstrom, 195 Fed., 725, 728.

Choctaw etc. Co. v. McDade, 191 U. S., 64, 67; 48 L. Ed., 96, 100.

Bunker Hill etc. Co. v. Kettleson, 121 Fed., 529, 532.

II.

The court erred in overruling defendant's objections to the testimony of H. A. Taylor and in overruling defendant's motion to strike out said testimony, and also in instructing the jury that they had the right to consider said testimony as bearing upon the question of whether the hook was defective or not. (Assignments of Error, III, IV, V, VII.)

The testimony given by said H. A. Taylor and the proceedings had in connection therewith are as follows: (Transcript of Record, pp. 70-74.)

“Q. Mr. Taylor, where do you live?

A. Portland, 1275 East Sixth Street, North.

Q. Did you ever work for the defendant, the Otis Elevator Company?

A. Yes, sir.

Q. When?

A. 1908. I don't remember the month; November or October.

Q. In what work were you engaged at that time?

A. Digging elevator shaft; what they term the well.

Q. Where?

A. Y. W. C. A. building.

Q. Y. W. C. A. building?

A. Y. W. C. A. building.

Q. The Young Women's Christian Association?

A. Yes, sir.

Q. Were you working there first when Mr. Hyde

was on the job, or were you there at any time when he was on the job?

A. Yes, sir.

Q. Were you there after he left the job and when the Otis Elevator Company took it over?

A. Yes.

Q. Did you continue to work for the Otis Elevator Company?

A. Yes, sir.

Q. Now, after that—after Mr. Hyde had left, the Otis Elevator Company took the work over; what were you doing for it?

A. I was digging the shaft.

Q. Digging in the shaft. Did you, at that time, notice how the bucket was connected with the cable—the bucket which carried the dirt?

A. Yes, sir; the bucket was connected with what is termed a pigtail hook.

Court: What kind—pigtail?

A. Pigtail hook; yes, sir.

Q. Was it similar to that?

A. Yes, just about the kind of a hook.

Q. Now, while you were working there in the well, state whether or not any accident occurred, and if so, what?"

To which question counsel for defendant objected as being incompetent, immaterial and irrelevant.

"Court: Well, I suppose if it occurred through the use of this hook, it would be competent to show that the company knew it was an imperfect hook.

Mr. Fulton: I propose to show that practically the same accident occurred there, and that it was communicated to Mr. Shepard, the superintendent of the company."

Whereupon, the court overruled defendant's objection, to which ruling defendant then and there excepted, which exception was allowed, and the witness further testified:

"A. A bucket fell 53 feet there.

Q. What say?

A. I was working in the bottom of the shaft, about 53 feet from the top of the basement of the Y. W. C. A. building, and a bucket came down on me.

Q. Well, how did it come down? How did it happen to come down—slip off the hook?

A. It slipped off the hook.

Q. As it was descending into the well?

A. Yes, sir.

Q. What did it do to you?

Mr. Leiter: I object to that as incompetent.

Court: The only question is whether it slipped off the hook.

Mr. Fulton: I don't insist on that if objected to.

Court: The extent of this man's injury has no bearing on this case; it is only competent for the purpose of showing that the company, or tending to show that the company knew it was an improper hook.

Q. Do you know whether Mr. Shepard knew that

the bucket came off at that time when you were in the well?

A. No, sir, I do not.

Q. What say?

A. I do not.

Q. Did you have any talk with him about it?

A. No, sir. I had a talk with the man that was working on top of the shaft, taking care of the bucket—unhooking and hooking the hook in the bail.

Q. What say?

A. I had a talk with the man that was hooking and unhooking the hook from the bucket; in order to dump the bucket he had to unhook the hook.

Q. Never mind what he said. I understand you had a talk also with Mr. Shepard about the injury you received at that time. Did you have any talk with him about the injury you received at that time?

A. The injury that I received at that time—

Mr. Leiter: I object, may it please the court, as incompetent, immaterial and irrelevant.

Mr. Fulton: I think it would tend—it is not competent for the purpose of showing injury.

Court: No, but for the purpose of bringing knowledge home to the company of the accident.

A. I told Mr. Shepard at the time that I wanted to be sure the man understood how to hook the hook in there. I didn't like to go in the shaft and put my life in danger at the bottom of that shaft with a man who didn't know anything about the hook.

Q. Was that after the bucket came off?

A. No, sir, before the bucket came off.

Q. I mean after the bucket came off?

A. No, sir, not that I remember.

Q. I was mistaken; I thought you had. That is all."

Whereupon, counsel for defendant moved that all of the testimony of said witness H. A. Taylor in regard to the falling of the bucket be stricken out, because counsel for plaintiff had failed to show that defendant had any knowledge of the occurrence—which motion was overruled, to which ruling defendant then and there excepted, which exception was allowed.

In charging the jury the court referred to Taylor's testimony and the effect thereof in this manner: (Transcript of Record, pp. 118-119.)

"There has been evidence introduced tending to show that some time before this accident, and while this same hook and line were being used in lowering a bucket into the elevator shaft, that the bucket fell and struck one of the workmen. That evidence is only proper, and could only be considered by you for the purpose or as it may bear upon the question as to whether the hook was a safe and proper hook. There is no evidence here that the defendant company knew of that accident, or was advised of it—no direct evidence that it knew of that accident or was advised of it, and the evidence could only be considered as it may bear upon the question as to whether the hook was a defective one or not."

To the giving of this instruction defendant excepted. (Transcript of Record, p. 124.)

This evidence was irrelevant because it was too remote in point of time, because there was no showing of similarity of circumstances or conditions, and because it failed to show knowledge on the part of defendant of the condition of the appliance.

§ 7779, VI Thompson on Negligence.

26 Cyc., p 1429.

§ 163, Jones on Evidence (2d ed.).

§ 185, 1 Elliott on Evidence.

§ 2506, 3 Elliott on Evidence.

Evidence of prior conditions is inadmissible.

(a) Where the conditions are not shown to have been the same as at the time of the accident.

Willson v. Logan, 139 Ill. App., 204.

Powers v. Boston etc. Co., 175 Mass., 466; 56 N. E., 710.

Keatley v. Ill. etc. Co., 94 Iowa, 685; 63 N. W., 560.

Root v. Kansas etc. Co., 195 Mo., 348; 92 S. W., 621.

(b) Where such prior condition is not shown to have been connected with the cause of the accident.

Sugar Creek etc. Co. v. Peterson, 177 Ill., 324; 52 N. E., 475.

(c) On account of lapse of time, where conditions are not the same as at the time of the accident.

Stecher etc. Works v. Steadman, 78 Ark., 381;
94 S. W., 41.

Little Rock etc. Co. v. Eubanks, 48 Ark., 460;
3 S. W., 808.

(d) Where the defendant had no notice thereof.

Fisher v. Nubian etc. Co., 60 Ill. App., 568.

Murphy v. Stanley, 136 Mass., 133.

(e) As presenting collateral issues.

Whitney v. Gross, 140 Mass., 232; 5 N. E., 619.

Calcaterra v. Iovaldi, 123 Mo. App., 347; 100
S. W., 675.

Parker v. Portland Pub. Co., 69 Me., 173.

Muller v. Hale, 138 Cal., 163; 70 Pac., 81.

And evidence of prior accidents is inadmissible.

(a) Where the conditions were not the same.

Sherman v. Kortright, 52 Barb., 267.

Vander Velde v. Leroy, 140 Mich., 359; 103
N. W., 812.

Overcash v. Charlotte etc. Co., 144 N. C., 572;
57 S. E., 377.

Gustafson v. Young, 91 App. Div., 433; 86
N. Y. Supp., 851.

Barrett v. Hammond, 87 Wis., 654; 58 N. W.,
1053.

(b) Where notice of same has not been brought home to defendant.

Bridger v. Asheville etc. Co., 27 S. C., 456;
3 S. E., 860.

Martinez v. Planel, 36 Cal., 578.

Roche v. Llewellyn etc. Co., 140 Cal., 563; 74
Pac., 147.

Jacques v. Bridgeport etc. Co., 41 Conn., 61.

(c) As presenting collateral issues.

Davis v. O. & C. R. R. Co., 8 Or., 172.

Phillips v. Willow, 70 Wis., 6; 34 N. W., 731.

III.

The court erred in refusing to instruct the jury at the request of defendant as follows:

“If you find that the defendant was negligent as charged in the complaint, before plaintiff can recover in this action, you must further find that defendant’s negligence was the proximate cause of the accident, that is—that cause which conduced directly to the accident, and without which the accident would not have occurred.”

Assignment No. VIII (Transcript of Record, p. 131).

Defendant was not liable unless its negligence was the proximate cause of plaintiff’s injury. The request was proper and was not covered by the general charge of the court.

ARGUMENT.

I.

The law as it relates to the doctrine of assumption of risk is so well defined that it seems unnecessary to cite many cases on this point. A very concise statement of these principles is found in the case of *Chicago etc. Co. v. Shalstrom*, 195 Fed., 725, from which we quote at page 728:

(1) A servant by entering and continuing in the employment of a master without complaint assumes the ordinary risks and dangers of the employment and the extraordinary risks and dangers thereof which he knows and appreciates. *Choctaw, Oklahoma & Gulf R. R. Co. v. McDade*, 191 U. S. 64, 67, 24 Sup. Ct. 24, 48 L. Ed. 96; *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 508, 61 C. C. A. 477, 490, 63 L. R. A. 551; *Glenmont Lumber Co. v. Roy*, 126 Fed. 524, 528, 61 C. C. A. 506, 510; *Burke v. Union Coal & Coke Co.*, 157 Fed. 178, 180, 84 C. C. A. 626, 628.

(2) Although the risk of the master's negligence and of its effect unknown to the servant is not one of the ordinary risks of the employment which he assumes, yet if the negligence of the master or its effect is known and appreciated by the servant, or is obvious, or "so patent as to be readily observed by him by the reasonable use of his senses, having in view his age, intelligence, and experience" (*United States Smelting Company v. Parry*, 166 Fed. 407,

410, 92 C. C. A. 159, 162), and he enters and continues in the employment without objection, he elects to assume the risk of it, and he cannot recover for the damages it causes (*Texas & Pacific Ry. Co. v. Archibald*, 170 U. S. 665, 672, 18 Sup. Ct. 777, 42 L. Ed. 1188; *Choctaw, Oklahoma & G. R. R. Co. v. McDade*, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96; *Burke v. Union Coal & Coke Co.*, 157 Fed. 178, 181, 84 C. C. A. 626, 629; *Lake v. Shenango Furnace Co.*, 160 Fed. 887, 892, 88 C. C. A. 69, 74).

(3) When a defect is obvious or “so patent as to be readily observed by a servant by the reasonable use of his senses, having in view his age, intelligence and experience,” and the danger and risk from it are apparent, he cannot be heard to say that he did not realize or appreciate them. *Utah Consol. Min. Co. v. Bateman*, 176 Fed. 57, 63, 99 C. C. A. 365, 371, 27 L. R. A. (N. S.) 958; *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 501, 509, 511, 61 C. C. A. 477, 483, 491, 594, 63 L. R. A. 551; *Glenmont Lumber Co. v. Roy*, 126 Fed. 524, 528, 61 C. C. A. 506, 510; *Lake v. Shenango Furnace Co.*, 160 Fed. 889, 892, 88 C. C. A. 69, 72.

(4) No duty rests on the master to warn a servant of defects, risks, or dangers that are “so patent as to be readily observed by him by the reasonable use of his senses, having in view his age, intelligence and experience.” *Bohn Mfg. Co. v. Erickson*, 55 Fed. 943, 946, 5 C. C. A. 341, 344; *Glenmont Lumber*

Co. v. Roy, 126 Fed. 524, 528, 529, 61 C. C. A. 506, 510, 511; *King v. Morgan*, 109 Fed. 446, 449, 48 C. C. A. 507, 510; *Railroad Co. v. Miller*, 104 Fed. 124, 43 C. C. A. 436; *Mississippi Riv. Log. Co. v. Schneider*, 74 Fed. 195, 197, 20 C. C. A. 390, 392; *Lake v. Shenango Furnace Co.*, 160 Fed. 889, 892, 88 C. C. A. 69, 72.

(5) Assumption of risk rests upon the maxim, "*Volenti non fit injuria*," and upon the contract of employment. It rests upon the principle that no legal injury can be inflicted upon one who willingly assumes the known or obvious risk of it, and hence it includes the risk of known or obvious defects and dangers which the master or the foreman directs the servant to incur during the employment, for the latter is as free to decline to obey such an order as he is to decline to take or to continue in the employment, and where he knows and appreciates the defect and danger as well as the master or the foreman, he becomes subject to the maxim, upon the willing no legal injury can be inflicted. The order or direction of the master, or of the foreman, to the servant to work at a specified place, or with certain appliances, does not release the servant from his assumption of the apparent risks and dangers of defects in the place, structure, or appliances that are known to him, or are "so patent as to be readily observed by the reasonable use of his senses, having in view his age, intelligence, and experience." *Railroad Co. v. Jones*, 95

U. S. 439, 443, 24 L. Ed. 506; *Kean v. Detroit Copper & Brass Mills*, 66 Mich. 277, 33 N. W. 395, 400, 11 Am. St. Rep. 492; *Stuart v. New Albany Mfg. Co.*, 15 Ind. App. 184, 43 N. E. 961, 964, 965; *Paule v. Florence Mining Co.*, 80 Wis. 350, 50 N. W. 189, 191; *Showalter v. Fairbanks, Morse & Co.*, 88 Wis. 376, 60 N. W. 257, 258; *Toomey v. Eureka Iron & Steel Works*, 89 Mich. 249, 50 N. W. 850; *Linch v. Manufacturing Co.*, 143 Mass. 206, 210, 9 N. E. 728; *Bradshaw's Adm'r. v. Railway Company* (Ky.), 21 S. W. 346; *O'Connell v. Clark*, 22 App. Div. 466, 468, 48 N. Y. Supp. 74; *Davis v. Detroit & Milwaukee R. R. Co.*, 20 Mich. 105, 127, 4 Am. Rep. 364; *Wilson v. Tremont & Suffolk Mills*, 159 Mass. 154, 155, 34 N. E. 90; *Burlington & C. R. Co. v. Liehe*, 17 Colo. 280, 285, 29 Pac. 175, 176.

(6) The agreement of the servant to assume the ordinary risks of his employment and the extraordinary risks thereof that are known to and appreciated by him inheres in and is an inextricable part of his contract of employment, and when that is proved or admitted the assumption of these risks is proved, and no further pleading or proof on the part of the defendant is necessary to establish it. *Malme v. Thelin*, 47 Neb. 686, 66 N. W. 650; *Glantz v. Chicago, B. & Q. R. Co.*, 87 Neb. 60, 127 N. W. 221; *Evans Laundry Co. v. Crawford*, 67 Neb. 153, 93 N. W. 177, 94 N. W. 814; *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 501, 61 C. C. A. 477, 483, 63 L. R. A. 551.

(7) When the uncontradicted evidence discloses the fact that the defects in the place, structure, or appliances were "so patent as to be readily observed by the plaintiff by the reasonable use of his senses, having in view his age, intelligence, and experience," and the risks and dangers from them were apparent, and he entered upon or continued in the service without complaint, his assumption of the risk is conclusively established, and the court should instruct the jury to return a verdict for the defendant. *Glenmont Lumber Co. v. Roy*, 126 Fed. 524, 528, 61 C. C. A. 506, 508; *Federal Lead Co. v. Swyers*, 161 Fed. 687, 690, 88 C. C. A. 547, 550; *Stewart v. Brune*, 179 Fed. 350, 355, 102 C. C. A. 534, 539.

This Circuit holds to the general rule in *Katalla Co. v. Rones*, 186 Fed., wherein the court, at page 33, states:

"There exists an exception to the general rule that an employe may assume that reasonable care will be observed by his employer for his protection, which is that where a defect in machinery is known to an employe or is so patent and obvious as to be readily observable while engaged in his work, and he continues in the use and operation thereof notwithstanding the defect, he assumes the risk and hazard attending such use. The reason for the exception is that having such knowledge or possessed of the ready means of acquiring it and shutting his eyes to palpable conditions, he elects to engage in the service,

and therefore to undergo the hazard on his own account."

The assumption extends not only to the ordinary risks known to the servant but also to "those which he might, in the exercise of reasonable care, have discerned": *Puget Sound etc. Co. v. Harrigan*, 176 Fed. at 491. And "full opportunity to observe the conditions making the employment dangerous" is equivalent to knowledge and the resulting assumption: *Bunker Hill etc. Co. v. Kettleeson*, 121 Fed. at 532.

There were several points of conflict in the testimony. Luck claimed he was a mechanic merely (Transcript, p. 28) earning 37½ cents an hour or \$3.50 per day (Transcript, p. 43), and after the accident he was appointed foreman at \$4.00 per day (Transcript, p. 57).

Defendant claimed that Luck was a foreman (Transcript, pp. 75, 85, 93) earning 50 cents an hour, or \$4.00 for a day's work of 8 hours (Transcript, p. 75) and his wages continued the same afterwards as before (p. 76). There was also some conflict as to Luck's authority and as to what he did toward selecting and ordering material. It was undisputed, however, that Luck kept the time, turned in the slips, signed the same above the word "foreman," drew higher pay than any other man on that job and worked longer hours as a rule than any other man on the work, reporting earlier and working later. He

was the only mechanic on that work and the others were helpers to him. (Transcript, p. 91.)

He started on this job the day after Thanksgiving, 1909, and worked constantly until the accident on February 24, 1910, but not on the same hole. (Transcript, p. 45.) He had worked as a mechanic for defendant for four years. In the construction of plunger elevators, in addition to this job, he had worked for two weeks on the Y. M. C. A. building. During the three months on this job, he took his turn in the well (Transcript, pp. 44-45) and worked all over the place.

We quote extracts from plaintiff's testimony concerning the hook.

“Q. But the same hook to fasten the different kinds of buckets to the cable would be used, both in hauling it out and for lowering the buckets?

A. Yes, sir.

Q. Well, you had seen that hook there, I suppose, had you not.

A. What is that?

Q. You had seen the hook there?

A. Have seen the hook?

Q. You had seen the hook, had you not?

A. Yes, sir, the hook was used there all the time.

Q. Well, you had seen it used, I mean?

A. Well, we had used it there right along, yes.

Q. You had used it yourself, had you not?

A. Well, I guess I had.

Q. Well, don't you know whether you had or not?

A. I have put it on the bucket the same as anyone else.

Q. You have put it on the bucket?

A. Yes, sir.

Q. The same as anyone else working there?

A. Yes, sir.

Q. And, in the doing of that work, it would be necessary to do that quite often, would it not?

A. Every bucket.

Q. Every bucket?

A. Yes, sir.

Q. So that during the time you were working there you knew what kind of hook it was, did you not?

A. I never knew what they called it.

Q. Never knew what they called it?

A. No, sir, never seen a hook like that before.

Q. Did they have a hook like that on the Y. M. C. A. building?

A. Yes, we used that.

Q. Used the same kind of a hook on the Y. M. C. A. job?

A. The same hook.

Q. The same hook?

A. Yes.

Q. And you had worked on that job over there, had you?

A. Yes, sir, about ten days or two weeks, I think.

Q. And had used this same hook over there?

A. Yes, sir." (Transcript, pp. 45-47.)

"Q. Well, as a matter of fact, you considered the hook you were using as perfectly safe, didn't you?

A. Yes, sir, I thought it was all right.

Q. You used it for several months there, did you not?

A. Yes, sir.

Q. Used the same hook on the Y. M. C. A. building?

A. Yes, sir.

Q. And you used the same hook on the Olds, Wortman & King building?

A. Yes, sir.

Q. Not only to haul buckets of earth out of the well, but also to lower them into the well?

A. Yes, sir.

Q. And you had worked there continually during all that time, and saw the hook, and saw how it behaved, and you considered it safe and proper, did you not?

A. Well, I couldn't see how it behaved.

Q. Well, the bucket didn't fall on you, did it?

A. Well, that don't say how it behaved.

Q. Well, if you had considered it an unsafe appliance you would have remonstrated about it, wouldn't you?

A. You will have to read that over again.

Q. If you had considered it an unsafe hook, you would have kicked about it, wouldn't you?

A. I think I would.

Q. You had a right to do that, didn't you?

A. Yes, sir.

Q. Did you ever complain about that to Mr. Shepard?

A. No, sir.

Q. Or to anybody else?

A. Not that I know of.

Q. And you knew that if this prong wasn't high enough, if the bucket should happen to strike the casing, or some other obstructions, the bail might slip out, might it not?

A. I guess it might. That is what it done this time.

Q. Sure, and you knew that, didn't you?

A. Never stopped to consider that.

Q. You don't have to be a mechanic to know that, do you?

A. Got to be better than a mechanic to decide that.

Q. How?

A. You would have to be better than a mechanic to.

Q. Wouldn't anybody, Mr. Luck, know that if this hook was of the character described by you, that the slightest knock on the bottom of the bucket so as to release—so as to put any slack there, would cause the bail of the bucket to slip out of that hook?

A. Well, I look at it this way: Mr. Shepard had that hook made, and that was the hook that was going to be used there, and I thought he knew everything about it—that the hook was safe.

Q. But you also knew enough about it to know the character of work that was being done there, didn't you?

A. I knew the character of work that was being done.

Q. And you knew the likelihood of the bucket striking against the side of the well, or against the bail, didn't you?

A. Well, sometimes it does it.

Q. That wasn't an unusual occurrence was it, Mr. Luck?

A. Oh, no, it would scratch. Sometimes you would have some trouble with it striking some places, owing to how close that casing comes out to the center of the hole. Sometimes there wouldn't be hardly room enough to get the bucket through.

Q. And the bail of the bucket was about five-eighths inches in diameter, wasn't it?

A. About, yes.

Q. And it was of iron or steel, wasn't it?

A. It was of iron.

Q. Of iron. So that there would be no give to it, would there?

A. The only time there would be any give to it would be when it would strike something.

Q. When it would strike something there might be some play in it.

A. Yes, sir, the load in it was liable to draw the sides together—a heavy load like that.

Q. And in doing that, the blow might be enough to jump out of this hook?

A. No, sir, I don't think so.

Q. Well, it must have been, because as you say it did it on this occasion?

A. Well, it hit then.” (Transcript, pp. 53-56.)

“Q. Now, in your direct examination, you said that you never had your attention called to this hook. As a matter of fact you had seen it there every day, had you not?

A. Using it there every day.

Q. Both fastening the bucket to it, and unfastening the bucket from it?

A. Well, it was not that we took the cable off. We never took the cable off the hook, it was just taking the hook off the bucket—that was all.

Q. The hook at all times was fastened to the cable?

A. Yes, sir, that is, fastened on there with Crosby clips.

Q. But, in doing the work, it would be necessary very frequently for the bucket to be taken off the hook?

A. Yes, sir, it was taken off practically every load.

Q. And sometimes you would take it off and sometimes someone else would take it off?

A. Yes, sir.

Q. Sometimes you were down in the hole, and at other time somebody else?

A. Yes, sir.

Q. And during all of the time that you had used this hook you never made any complaint about its being unsuitable?

A. No, sir.

Q. And, as a matter of fact, you didn't think that it was unsuitable?

A. I didn't catch that question there.

Q. I say you really didn't think it was unsuitable, because you never made any kick about it.

A. Well, I thought it was all right.

Q. And the hook was perfectly in plain sight so you could have seen it while it was being used there?

A. Plain sight there all the time.

Q. And, as a matter of fact, you did see it?

A. Couldn't help but see it.

Q. And you knew that if the bucket would strike against something, so as to be jarred loose from the hook, it might fall down into the hole?

A. That never crossed my mind.

Q. Well, you probably didn't think of that specific thing, but then you understood that, didn't you?

A. Well, I didn't think it would come off of there.

Q. But you knew that if it did come off the bucket necessarily would fall?

A. That's a fact.

Mr. Fulton: Yes, most of us would know that.

Q. And you understood also that if the bucket fell while you were down in the well there, and it struck you, you might be injured?

A. Yes, sir, found that out by experience.

Q. Well, you knew that beforehand, too, didn't you?

A. A question like that never crossed my mind."
(Transcript, pp. 58-60.)

The risk of the bucket revolving or swinging so as to strike the walls of the excavation or of the casing in the hole was plainly one of the ordinary risks of plaintiff's work in the well. So, also, was the likelihood of the bail of the bucket being jarred from the hook by reason of such contact. Furthermore, plaintiff not only had full opportunity to observe the conditions which made this work dangerous, but the circumstances were such that in the exercise of any sort of reasonable care, plaintiff should have discovered any and all dangers or defects in the hook in use. He was more familiar than any one else with the exact character of the hook and with the service to be performed by it and the conditions under which it was to be used. He had used it continuously for three months. The situation and conditions were open and obvious. He was an experi-

enced workman, and where he had such actual knowledge of the hook and the defect, if any, therein, and where the alleged defect was so open and obvious and readily discernible, as shown by the testimony, plaintiff cannot be heard to say that he did not appreciate the risk.

II.

The accident in question occurred on February 24, 1910, on the Olds, Wortman & King building. The occurrence testified to by Taylor happened in October or November, 1908, one year and three or four months previously and on the Y. W. C. A. building. There was no testimony introduced showing any similarity of conditions or appliances, other than that a hook was then used similar to the one in use when Luck was injured. Hyde testified that in October or November, 1908, he had the particular hook used when Luck was injured made for work on the Y. W. C. A. building, and at that time it was a perfectly safe hook, known as a "pigtail hook." (Transcript, p. 65.) The inference from the testimony of Hyde and Taylor is that the hook made by Hyde was in use at the time testified to by Taylor and also at the time of Luck's injury. Its condition at the latter date, however, was different from what it was in 1908.

The testimony of Taylor was offered for the purpose of showing that practically the same accident occurred before and that it was communicated to the

defendant's superintendent. (Transcript, p. 72.) And the court admitted it as being competent to show that the company knew it was an improper hook. (Transcript, p. 72.) Counsel wholly failed to show that the defendant had knowledge of the occurrence of the accident. Taylor's conversation with the superintendent was had prior to the occurrence of the accident and was directed entirely to the competency and fitness of the man above, whose duty it was to fasten the bucket onto the hook. (Transcript, pp. 73-74.)

The court declined to strike out the evidence and instructed the jury that there was no direct evidence that defendant had knowledge of the Taylor accident but that the jury could consider his evidence as bearing upon the question as to whether the hook in use at the time of plaintiff's injury was a safe and proper or a defective hook. (Transcript, pp. 118-119.) In other words, the testimony was admitted for the purpose of showing knowledge on the part of defendant that this hook was or might be an imperfect or improper hook, and it was kept in the case for the purpose of being considered by the jury in order to enable them to determine if the hook furnished at the time of Luck's injury was a safe and proper one—two entirely distinct purposes.

We contend that this testimony was irrelevant because there was no showing of similarity of condition or circumstances. In fact, the testimony dis-

closed that the hook was in very different condition than from what it was when the accident the jury were concerned with occurred. Furthermore, the time was entirely too remote. What happened fifteen months before with an appliance in a different condition and under circumstances of operation which may have been and probably were entirely dissimilar, certainly could not aid the jury in determining whether or not the defendant failed to exercise ordinary care at the time of this accident in furnishing the hook then used. On the contrary, the undoubted effect of the introduction of this evidence was to confuse the minds of the jury, distract their attention from the main issue, and, resulting from counsel's impassioned comments thereon, prejudice the defendant before the jury.

Evidence of prior accidents may, under proper circumstances, be sometimes admissible to charge defendant with notice of unsafe conditions. The mere fact of prior accidents is not sufficient to establish unsafe conditions or appliances and evidence of them is therefore not admissible unless coupled with evidence of actual conditions. Here there was not only failure to show knowledge, as promised, but there also was a total lack of evidence of actual conditions then existing.

We have, then, a case of an accident occurring some fifteen months before at a different place with an appliance in a different condition under unex-

plained circumstances and under undisclosed conditions, without any notice or knowledge thereof in the possession of defendant. For all that appeared, the bucket may have come off the hook on that occasion by reason of the manner in which a helper adjusted the hook, or for some other unknown reason. This testimony is then received for the purpose of showing knowledge on defendant's part that the hook was improper. The testimony failing in this it is then retained before the jury and they are invited to consider said occurrence "as it may bear upon the question as to whether the hook was a safe and proper hook"—the ultimate fact in issue.

That is to say, from the occurrence of the Taylor accident the jury were in effect given the right to infer that the hook used was a defective appliance. We know of no case which goes so far.

Even if the testimony were admissible to show defendant's knowledge of a defective appliance (it wholly failed to do this) and defendant had actual knowledge of the occurrence of the accident, it would only have been proper for the court to have instructed the jury that such testimony could be considered by them in determining whether or not defendant having such knowledge exercised ordinary care to provide plaintiff a reasonably safe appliance. It still would be improper to permit the jury to find the hook a defective one from the fact of defendant's knowledge of a prior accident. The admissibility of

the testimony rests in knowledge. The fact of a defective hook must be found in independent evidence bearing directly upon the device itself. Such a finding cannot be based upon collateral evidence of this character. Defendant's knowledge goes merely to illustrate its care under the particular circumstances.

Furthermore, the character and construction of this hook were as simple as can well be imagined. Its construction, whether safe or unsafe, was open to the observation and understanding of any man of ordinary sense. There was, therefore, no occasion for evidence of other accidents to show that it was unsafe. *Edwards v. Barber etc. Co.*, 92 Mo. App., 226.

On this point we quote from some of the writers as to the admissibility of evidence of this character.

“As a general rule, in an action by a servant for personal injuries, other accidents or acts of negligence are inadmissible in evidence to show negligence on the part of defendant, unless shown to be closely connected with the accident complained of as to time, place and circumstances.” 26 Cyc., p. 1429.

“Evidence of similar accidents from the same cause, though of slight probative value, is sometimes admitted as tending to prove the *dangerous character* of the machine. The better rule allows such evidence on the question of the *master's knowledge* of the con-

dition of an appliance, and for that purpose only.”
 § 7779, VI Thompson on Negligence.

“In actions for negligence the question often arises as to what extent facts apparently collateral to the issue may be received. For example, in actions for personal injury on a highway it may become relevant to show, for the purpose of proving notice on the part of the municipality, that other persons have received injuries at the same place. There is a class of decisions in which it is held that in suits for injuries caused by defective streets it is relevant for the plaintiff to prove other similar accidents for the purpose of showing the dangerous character of the street. Although this view seems to be sustained by numerous cases, it is open to the obvious objection that it permits the introduction of numerous collateral issues whereby the attention of the jury may be diverted from the main question. The contrary view has the support of very high authority and, in the opinion of the author, is sustained by the better reasoning.” § 163, Jones on Evidence, 2d ed.

“The question as to the relevancy and admissibility of evidence apparently collateral, frequently arises in negligence cases. For the purpose of showing the existence of the defect complained and the material circumstances, it is admissible to prove the condition of the place, or machinery; where it has remained unchanged, for some time before and after the accident. But the time must not be too remote.

* * * Evidence of other accidents at the same place has also been received for the same purpose or as tending to show the dangerous character of the place, but we think the better rule is, that such evidence is admissible only to show notice or the like.”
 § 185, 1 Elliott on Evidence.

“There is conflict among the authorities as to whether evidence of previous similar accidents at the same place is admissible, but we think the better rule is that such evidence is not admissible, ordinarily at least, to prove negligence at the time in question. But it has been held in some cases that evidence of the happening of prior accidents at the same place, in a sidewalk for instance, tended to show that tested by actual use it had been demonstrated to be unsafe, and much the same view has been taken in a few cases in regard to machinery. So, in a few instances, it has been held competent to show, on the other hand, that no such accident had happened before. But, while evidence of prior accidents might have been admissible in some of these cases on the question of notice, it raises too many distinct and collateral issues, and evidence that there were or were not prior accidents is of very little if any probative value without a knowledge of all the facts and conditions at such other times, and is usually unnecessary because the facts in regard to the condition and circumstances at the time in question are susceptible of direct proof.” § 2506, 3 Elliott on Evidence.

Under none of the cases is testimony of this character admitted to show negligence. That was the effect of the testimony here admitted under the court's instruction. To justify its admission on any theory, there should have been a showing of similarity of working conditions. Here there was none. No testimony was offered to show that the dimensions of the well were the same or the conditions were materially the same or the working methods were in any way similar. This was all left to the imagination. In the absence of such a showing the testimony was not admissible, even to show knowledge. We confidently assert that the court's rulings in respect to this testimony, including his instruction, were erroneous.

III.

An essential element of the right to recover is that the defects complained of should have been the proximate cause of the injury. 20 Ency. Law (2d ed.) 78. Under the testimony there was some room for doubt as to whether the accident was caused by reason of a defective appliance or by reason of the manner in which the hook had been fastened to the bucket or by reason of the manner in which the bucket was being lowered. The request made by defendant was a correct statement of the law, and nowhere in his charge did the court either define proximate cause or state to the jury that defendant would be liable only in the event that defendant's negligence, if

found, was the direct or proximate cause of the injury. Under these circumstances the refusal of said instruction was error.

For the reasons herein urged, error was committed and the judgment should be reversed.

Respectfully submitted,

GRIFFITH, LEITER & ALLEN,
Attorneys for Plaintiff in Error.

No. 2157

In the United States
Circuit Court of Appeals
Ninth Circuit

OTIS ELEVATOR COMPANY

Plaintiff in Error

vs.

CHRISTIAN LUCK

Defendant in Error

Brief of Defendant in Error

**Upon Writ of Error from United States District Court
for the District of Oregon**

C. W. FULTON

Attorney for Defendant in Error

GRIFFITH, LEITER & ALLEN

Attorneys for Plaintiff in Error

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Circuit Court of Appeals
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OTIS ELEVATOR COMPANY

Plaintiff in Error

vs.

CHRISTIAN LUCK

Defendant in Error

Brief of Defendant in Error

**Upon Writ of Error from United States District Court
for the District of Oregon**

STATEMENT OF THE CASE.

This is an action for personal injuries, prosecuted by Christian Luck against the Otis Elevator Co. For convenience, I will follow the example of counsel for plaintiff in error and refer to the parties as they appeared in the District Court.

The complaint alleges, and the evidence established, that plaintiff was in the employ of defendant, as a mechanic in the work of installing elevators. It appeared by the evidence that two classes of elevators were installed, viz.: electric and plunger elevators. When the accident, resulting in the injury complained of occurred, they were installing a plunger elevator. It appeared

that comparatively few plunger elevators were installed, most of those installed being the electric type. Plaintiff at the time of the accident had been in defendant's employ about four years, but during that time only two plunger elevators had been installed by defendant, namely: one in the Young Women's Christian Association building and one in the Young Men's Christian Association building, in Portland, Oregon. In the installation of a plunger elevator it was necessary to dig a hole or well for the shaft. The well would be as deep as the shaft was to be long; would be three feet wide one way and three feet 6 inches the other. When the well had been sunk the required depth, a sheet iron casing about fifteen inches in diameter would be erected in the center and then the earth would be filled in around it, the well being dug simply to enable them to install the casing.

On the 24th of February, 1910, plaintiff, in the course of his employment was at the bottom of the well, which, at that time, had been filled up to within about thirty feet of the top and the work of filling it up was in progress, and for that purpose the earth was let down in a bucket, which, when filled, weighed about 500 pounds. The bucket was carried by a cable attached by a hook. In descending the bucket was liable to swing against the sides of the well or strike the casing. At the time in question, the bucket, filled with earth, was being let into the well; it struck the top of the casing and was thereby separated from the hook and fell from the top of the casing, a distance of about 12 feet, upon plaintiff, whereby his spine was permanently injured, several of the vertebrae being crushed. The negligence charged was that the hook provided and employed for

attaching the bucket to the cable, was unsuitable and not reasonably safe for the purpose. The hook employed was termed a "pig tail hook." It was made of iron and the end which was designed to attach to the bucket was twice coiled, quite similar to the tail of a well-conditioned pig. Into these coils the iron handle or bail of the bucket was dropped. When the bucket was arrested in its descent by striking the sides of the well or the top of the casing, the hook was liable to become detached from the bucket and the latter would then, of course, drop with its load to the bottom, and that is what occurred on the occasion in question.

The answer of defendant averred three defenses, namely:

1. That plaintiff was foreman on the work and had the selection of all tools and instrumentalities, including this hook.

2. That the accident was by reason of the negligence of a fellow servant, in carelessly and improperly connecting the hook with the bucket and

3. That plaintiff was familiar with and knew the unsafe nature of the hook, yet continued without protest to work under it, and thereby assumed the risk.

These affirmative defenses were denied in the reply. The jury returned a verdict for \$7,000.00.

POINTS AND AUTHORITIES.

I.

An exception to a failure of a trial judge to give a requested instruction, must point out the particular request to which the exception is directed.

Connecticut Life Ins. Co. vs. Union Trust Co.,
112 U. S. 250-261.

II.

In an action to recover damages because of negligence in providing machinery or appliances not reasonably safe for the purpose, evidence of similar injuries to other persons by the same machine or appliances, is admissible.

District of Columbia vs. Armes, 107 U. S. 524.

Osborne vs. Detroit, 32 Fed. 36.

Patton vs. R. Co., 82 Fed. 979.

Hurd vs. R. Co., 8 Utah 241, (S. C.) 30 Pac. 982.

Wigmore on Ev., Vol. 1 Sec. 458.

Bloomington vs. Legg, 37 N. E. 696.

Taylorville vs. Stafford, 63 N. E. 824.

Spaulding vs. Lithograph M. Co., 50 N. E. 543.

Lombar vs. Village of East Texas, 48 N. W. 947 (Mch case).

III.

Evidence of prior similar injuries is admissible for the purpose of showing both the dangerous character of the device and constructive notice.

Lombar vs. Village, supra.

Osborne vs. Detroit, 32 Fed. 36.

District of Columbia vs. Armes, 107 U. S. 524.

Dyas vs. Southern P. Co., 73 Pac. 972.

IV.

The fact that the hook in question was a dangerous device was not so apparent that plaintiff would be charged with an assumption of the risk as a matter of law.

Katalla Co. vs. Rones, 186 Fed. 30.

V.

A servant will not be held to have taken on himself the risk incident to the use of unsafe machinery by continuing its use, without objection, after knowledge of its defective character or condition, unless he also understood and appreciated the risks to which he was exposed.

Biley's Master's Liability for Injuries to Servants, page 170.

ARGUMENT.

Defendant's counsel, in their brief, present three propositions on which they seek a reversal, namely:

1. That the court erred in denying defendant's motion for a verdict;

2. Error in admitting evidence of a prior similar injury, and

3. Error in failing to give a requested instruction.

THE MOTION FOR A DIRECTED VERDICT.

I shall devote little space to a discussion of defendant's contention that the evidence was insufficient to submit to the jury. The contention is based solely on the proposition of assumed risk. It is urged that the hook was so clearly defective that plaintiff was bound to take notice of its dangerous and defective character. This is not a case, however, where the plaintiff was working with and actually operating the device in question. He was not the hook tender, did not, in truth, come in contact with it or have occasion to carefully observe it at any time. True, defendant contended that plaintiff was its foreman and had charge of all appliances, but that was squarely denied by plaintiff and his

witnesses, and hence was a question for the jury. According to plaintiff's testimony, and he was corroborated therein by the very great weight of the evidence, his duties were confined to work at the bottom of the well. He assisted in digging the well; took his regular turn in the work of digging; worked in the well in fitting the casing; did no work outside of the well; had nothing whatever to do with operating the bucket, or attaching the hook. He simply took care or assisted in taking care of the dirt when lowered into the well; saw that the casing was truly carried up and the earth securely filled in around and about it. What was there in that work to specially direct his attention to or cause him to consider the character of the hook? Besides, the character, form or appearance of the hook was not such as to suggest its dangerous nature from a mere inspection of it.

THE EVIDENCE OF PRIOR SIMILAR INJURY.

Plaintiff called one Taylor as a witness. He testified that in October or November, 1908, he was in the employ of defendant, installing a plunger elevator in the Y. W. C. A. Building, working in the well; that he was "digging the shaft," that the same hook was used on that work and on one occasion, while the bucket was descending, it came off the hook and fell upon him. Said nothing about the injury to him. The testimony was objected to on the ground that it was "incompetent, immaterial and irrelevant." No suggestion was made that the time was too remote or that the conditions were not shown to be substantially the same. It is now urged (1) that such testimony is never competent, and (2) that the evidence did not disclose that the conditions

were the same, and (3) that the circumstance was too remote. None of these objections, except the general incompetency of such testimony, was urged at the trial. I submit that only the question of the competency of such evidence can or should be considered here. However, in any view, the testimony was properly received.

That the conditions were the same was clearly in evidence. It appeared from the evidence in the case that in only three instances were plunger elevators installed by defendant; in all other cases they installed electric elevators. (See testimony of plaintiff, Pg. 43, Transcript; testimony of defendant's superintendent. Shepard Pg. 111). The job on which the injury occurred was the third instance only of installing plunger elevators, and the hook was not used, for wells were not dug in the construction of electric elevators. This then was the third job only on which the hook had been employed. That it was the same hook, is conceded by counsel at page 30 of their brief, where they say:

"The inference from the testimony of Hyde and Taylor is that the hook made by Hyde was in use at the time testified to by Taylor and also at the time of Luck's injury."

They say, however, that "its condition at the latter date was different from what it was in 1908." But how different? The only evidence to that effect is that of Hyde at pages 65 and 66, transcript. He testified that he had the hook made, and as made, it was a safe hook and was such when he turned it over to defendant; that he next saw it when he was working on the job where plaintiff was injured and then it "had been spread." That the defendant's superintendent told him that "it had been sent to the shop where it was spread because

it was too hard to unhook.” The latter denied this and testified that no change had been made and the hook was the same when plaintiff was injured as it was when Hyde turned over to defendant. (Transcript pp. 100).

Now Taylor was working for defendant on the Y. W. C. A. Building when the accident to which he testified occurred, and after Hyde had turned over to defendants the hook. Evidently it was either as originally made or as changed by Shepard, when the accident witnessed by Taylor occurred. If in its original condition, the evidence tended to show that even then it was an unsafe device; if it was after it had been changed or “spread” then it was in exactly the condition it was when plaintiff was injured. In no view was the evidence incompetent.

REMOTENESS.

But counsel contend that the accident testified to by Taylor was too remote, for, they say, it occurred in October or November, 1908, while plaintiff was injured in February, 1910, or about fifteen months later. It is true that there is to be found in some of the decisions the doctrine that evidence of similar injuries must not be of circumstances too remote. But, aside from my contention that the remoteness of the circumstance in question was not mentioned at the trial, I submit that “remoteness” is a relative term. Here, while a year and three months had intervened, it appeared that during that time but two elevators had been installed where the hook was employed, and that in the installation of one of them the accident to which Taylor testified occurred. The probability of the condition of the hook having changed, was not worthy of consideration. The

mere matter of time, is not, of itself controlling in determining the question of remoteness. In Wigmore on Evidence, Sec. 437, it is said:

“When the existence of an object, condition, quality or tendency at a given time is in issue, the *prior existence* of it is in human experience some indication of its probable persistence or continuance at a later period. The degree of probability of this continuance depends on the chances of intervening circumstances having occurred to bring the existence to an end. The possibility of such circumstances will depend almost entirely on the nature of the specific thing whose existence is in issue and the particular circumstances affecting it in the case in hand. That a soap-bubble was in existence half-an-hour ago affords no inference at all that it is in existence now; that Mt. Everest was in existence ten years ago is strong evidence that it yet exists; whether the fact of a tree’s existence a year ago will indicate its continued existence today will vary according to the nature of the tree and the conditions of life in the region. So far, then, as the *interval of time* is concerned, no fixed rule can be laid down; the nature of the thing and the circumstances of the particular case must control.”

And in *Augusta vs. Hafers*, 61 Ga. 48, where a party was injured by falling into a cellar opening, two instances, within five or six years, of others falling into other like cellars were received in evidence.

In *Topeka vs. Sherwood*, 39 Kan. 690, (18 Pac. 933) where the injury was by tripping against a projecting plank in December, the fact of constant tripping against the plank from March to December, a period of ten months, was admitted.

HAD DEFENDANT DESIRED FURTHER PROOF THAT THE HOOK WAS IN THE SAME CONDITION WHEN THE TAYLOR ACCIDENT OCCURRED, THAT IT WAS WHEN PLAINTIFF WAS INJURED, THEY SHOULD HAVE DEMANDED SUCH FURTHER SHOWING AT THE TRIAL.

Discussing this proposition, Professor Wigmore, in his work on Evidence, Section 454, says:

“Where the time of the other instances is somewhat removed, it is sometimes thought wise to require a preliminary showing that the condition of the engine had not changed in the meantime. (ante Sec. 437); but the difficulty of such a showing by the plaintiff, and the ease for the defendant of showing such a change if it had occurred, make it much preferable to ignore this requirement and to leave it to the defendant, on the principle of Explanation (ante Sec. 449), to show such a change if he can. The other instances, moreover, may have occurred either before or after the time in question, for in either case they show the condition of the engine.”

In the case under consideration, no pretense was made that the hook was not in the same condition at the time of the incident to which Taylor testified that it was when plaintiff was injured. On the contrary, as we have shown, defendant Superintendent Shepard testified (Transcript. 1. 9. 9. .) that the hook has not been changed.

COMPETENCY OF SIMILAR INJURIES GENERALLY.

That evidence of similar injuries, is as a rule, com-

petent, is clearly sustained by the great weight of modern decisions. In the early case of *Collins vs. Dorchester*, 6 Cush. 396, it was held that such evidence was not competent. Of that decision, in *Wigmore on Evidence*, Sec. 458, it is said:

“There would probably have been little difference of practice in the use of this class of evidence, if there had not been a series of precedents in Massachusetts, beginning with *Collins vs. Dorchester*, which attempted to cast discredit on the use of this evidence, and laid down an absolute rule of exclusion. That ruling proceeded from the point of view both of relevancy and of auxiliary policy, though without any full consideration of either reason; and, coming at a comparatively early date, served for a long time as a stumbling-block to many courts, whose instinct would have led them to receive such evidence. Its fallacies, from both points of view, were first clearly exposed by Mr. Justice Doe, in his classical opinion in *Darling vs. Westmoreland*; and from that time the tide of rulings began to turn. The ensuing cases show how an absolute rule of exclusion, like that of *Collins vs. Dorchester*, is now-a-days rarely attempted; and the two principles of relevancy and auxiliary policy are usually applied anew to each instance, as they ought to be. Strictly as a precedent, *Collins vs. Dorchester* applied only to injuries in a highway, but its influence was to be seen in opinions upon evidence involving other sorts of injuries, and even, to some extent over this whole group of evidential material. But Mr. Justice Doe’s opinion utterly discredited it as an obstacle to the investigation of truth, and even in its own jurisdiction it was gradually narrowed in its effect, until the doubt may now be maintained, whether

it would there be followed, even upon its precise state of facts. The precedents, however, in the various jurisdictions still show traces of its misleading influence."

That such evidence is competent in the Federal Courts is, I submit, settled by the decision of the Supreme Court in *District of Columbia vs. Armes*, 107 U. S., 519-524, which was an action for personal injuries resulting from a defective street or walk. At page 524, the court said:

"The admission of this testimony is now urged as error, the point of objection being that it tended to introduce collateral issues, and thus mislead the jury from the matter directly in controversy. Were such the case, the objection would be tenable; but no dispute was made as to these accidents, no question was raised as to the extent of the injuries received, no point was made upon them, no recovery was sought by reason of them nor any increase of damages. They were proved simply as circumstances which, with other evidence, tended to show the dangerous character of the sidewalk in its unguarded condition. The frequency of accidents at a particular place would seem to be good evidence of its dangerous character—at least, it is some evidence to that effect. Persons are not wont to seek such places, and do not willingly fall into them. Here the character of the place was one of the subjects of inquiry to which attention was called by the nature of the action and the pleadings, and the defendant should have been prepared to show its real character in the face of any proof bearing on that subject."

And continuing, at page 525-6, the court quoted with approval the language of the Supreme Court of Illinois, as follows:

“In an action against the City of Chicago, to recover damages resulting from the death of a person who in the night stepped off an approach to a bridge while it was swinging around to enable a vessel to pass and was drowned—it being alleged that the accident happened by reason of the neglect of the city to supply sufficient lights to enable persons to avoid such dangers—the Supreme Court of Illinois held that it was incompetent for the plaintiff to prove that another person had under the same circumstances, met with a similar accident. *City of Chicago vs. Powers*, 42 Ill. 169. To the objection that the evidence was inadmissible, the court said: ‘The action was based upon the negligence of the city in failing to keep the bridge properly lighted. If another person had met with a similar fate at the same place and from like cause, it would tend to show a knowledge on the part of the city and there was inattention on the part of their agents having charge of the bridge, and that they had failed to provide proper means for the protection of persons crossing on the bridge. As it tended to prove this fact it was admissible; and if the appellants had desired to guard against its improper application by the jury, they should have asked an instruction limiting it to its legitimate purpose.’”

Referring to *District of Columbia vs. Armes*, Mr. Justice Brown, in *Osborne vs. Detroit*, 32 Fed. 36, said:

“The admission of the testimony of Bateson in regard to the accident of himself and wife, and the precautions they took afterwards. Bateson testified, in substance, to the defective condition of the walk at that place, and that about two months before the accident he and his wife met with a slight accident there, and that after that they always walked in single file. We

take it that similar accidents, occurring in the same neighborhood may be shown as evidence, not only of the actual condition of the walk, but as tending to show notice to the city. It is true that the Massachusetts cases hold that this evidence is not admissible upon the ground that it raises a collateral issue which the defendant is not called upon to try, and therefore may well claim to be surprised. The weight of authority, however, is decidedly the other way. See *Delphi vs. Lowery's Adm'x*, 74 Ind. 521, in which all the former cases are viewed. So far as the federal courts are concerned, the question has been put at rest by the case of *District of Columbia vs. Armes*, 107 U. S. 519.

THE REQUESTED INSTRUCTIONS.

At the trial of this cause, the defendant presented some twenty requests for instructions of which only the following four are embodied in the Bill of Exceptions, namely:

1. "If you find that defendant was negligent as charged in the complaint, before plaintiff can recover in this action, you must further find that defendant's negligence was the proximate cause of the accident; that is—that cause which conduced directly to the accident, and without which the accident would not have occurred.

2. I instruct you that plaintiff assumed the ordinary risk and dangers incident to his employment, and if you find from the evidence that the risk of the bucket becoming dislodged from said hook while being lowered into the well was a risk and hazard incident to plaintiff's employment, then I instruct you that such risk was assumed by him and he cannot recover.

3. I also instruct you that plaintiff assumed such

risks in and about his employment as were open and obvious. An open and obvious risk is one that is instantly observed and appreciated by a person of ordinary intelligence. If you find from the evidence that the risk and danger of the bucket becoming unfastened from the hook as the same was being lowered into the well, was such an open and obvious risk as would be immediately observed and appreciated by a person of ordinary intelligence, then I instruct you that plaintiff assumed said risk and he cannot recover in this action.

4. If you find from the evidence that at the time of receiving his injury, plaintiff was just as well aware as his employers, of the condition of said hook, and the use to which the same was put, and of the dangers of working around the same, or if you find that by reason of his being in and about, and in close proximity to said hook for a considerable period of time, he had equal means with, or better opportunities than, the defendant, to discover that said hook was an unsuitable appliance, and that the danger of working there under such conditions was open and could have been discovered by the plaintiff by the use of ordinary care, then I instruct you that plaintiff cannot recover and your verdict should be for the defendant."

Here, it will be observed are four distinct requests, but, as stated, there were presented, something over twenty. Defendant now assigns as error in its brief, only the failure to give the first.

My contentions regarding this assignment are (1) that no exception was reserved; (2) that in substance the instruction was given.

In support of my contention that no exception was taken to the failure of the Court to give the instruction,

I call attention to page 124 of transcript which shows just what occurred in the matter of exceptions to the charge, namely:

“Whereupon, after the Court had instructed the jury as hereinbefore certified, on pages 49 and 52, inclusive of this Bill of Exceptions, and before the jury retired, the following colloquy between Counsel and Court took place:

MR. LEITER: I simply desire to make exception to give the defendant's requested instructions *in the form asked* and specify specifically an exception to that instruction given by your Honor, relative to the other accident—falling of the bucket on another job.

COURT: I think I have given in substance the instructions I intended to.

MR. LEITER: I have not been able to check them up entirely and for that reason desire an exception.”

Whereupon, the Court allowed said exception.

As stated, the Bill of Exceptions shows four requests, but in truth some twenty were presented. Counsel was not able to specify what particular request or requests he contended had not been covered by the charge as given. The Court told him he had endeavored to and supposed he had covered them all. Was it not the duty of Counsel then to point out the particular one or ones he thought were not covered? Surely it is unfair to the court and to the plaintiff that he should be permitted to thereafter select such as he could argue had not been given and assign error thereon. The plaintiff was entitled then and there to be informed what proposition the defendant claimed had not been submitted to the jury. The particular request which

he now contends it was error on the part of the trial judge to refuse to give was the following:

“If you find that defendant was negligent as charged in the complaint, before plaintiff can recover in this action, you must further find that defendant’s negligence was the proximate cause of the accident; that is—that cause which conduced directly to the accident, and without which the accident would not have occurred.”

This embodies an abstract proposition of law, which I contend was fully covered by the Court’s charge, but it is a proposition which would not have been disputed, although not a strictly accurate statement of the law. Had Counsel for defendant called attention to it, plaintiff’s counsel would have conceded the proposition then and there. It would be very unfair to permit this exception to be considered, in the circumstances, and I can not believe it will be considered. However, it was fully covered by the charge given. Among other instructions, the court said to the jury:

“The law is, that an employer is required to exercise reasonable care and diligence to provide his employee or employees with reasonably suitable tools and appliances to work with, and it was therefore the duty of the defendant in this case to exercise reasonable care and caution to provide suitable appliances with which to handle this bucket, and if it did not do so, and by reason of that fact, the bucket fell and injured the plaintiff without any fault on his part, it would be liable to him for such injury. Now what constitutes reasonable care and caution depends upon the circumstances of each case. The standard is, what would a reasonable prudent man have done under the same circumstances, and, therefore, the test will be whether or not a reason-

ably prudent person in charge of work of that character—of the character in which the plaintiff was engaged at the time of his injury, would have provided a hook of the kind and character in use at that time, and if he would, and the defendant's conduct measured up to this standard, then it discharged its duty and would not be liable for an accident that might have occurred without its fault. The defendant was not, and no employer is an absolute insurer of the safety of his employees. He is under no obligation to respond in damages to a man in his service who is injured unless he himself is at fault. Accidents may happen, and are likely to happen at any time without fault of anybody and for such accident, an employer is not liable. Nor is negligence to be imputed or inferred from the mere fact of the accident, but the burden is on the plaintiff in this case to show by a preponderance of testimony that the hook in use at the time of this accident was not suitable and proper under the rule, substantially as I have given it to you. In other words, that it was not such a hook as a reasonably prudent man would have provided under the circumstances for use in that character of business. If you find that it was such a hook, then of course this case is ended, and your verdict would be in favor of the defendant."

"If, on the other hand, you find that it was not a suitable hook, then it will be necessary for you to consider the other questions that I have suggested to you. It is claimed by the defendant that Mr. Luck, as I said, was in charge of the work, and that he had authority under his employment to provide these instrumentalities, and that it furnished suitable material from which hooks could be made, or suitable hooks, and left

it to Mr. Luck's judgment as to the kind and character that should be used in the work. If it did that, and if that was the relationship of the parties, then Mr. Luck could not recover against it, because of a defective hook that he himself used when he had a right, and could have selected or procured another. If the company furnished suitable materials—suitable hooks, or suitable materials with which to make hooks—and left the question to Mr. Luck's judgment, as to the kind and character to be used, then it discharged its duty, and he will have no cause to complain if he was injured because of the character of hook he voluntarily used. But unless he was charged under his employment with this duty, then it makes no difference whether he was a foreman or a common laborer, because the obligation of an employer to furnish when he assumes to do so, his foreman with reasonably safe tools and appliances, to work with, is just the same as any other workman, and the relationship of Mr. Luck and the defendant in this connection only becomes important in determining whether he himself had authority to make selection of this hook, or instrumentality."

"If he had, whether he was a foreman or a common laborer, and he chose a defective hook or chose to use a defective hook, when he had a right to procure another and suitable one, he would have no cause of action against the company whether a foreman or common laborer. On the other hand, if he was not charged with that duty, did not have that right, then it makes no difference whether he was a foreman or a laborer, because the company owed him just exactly the same duty, regardless of his grade of employment."

"Then, another question. It is said in this case, and

claimed by the defendant, that this accident occurred through the negligence or carelessness, as I suggested, of the man at the top of the shaft, who attached the bucket to the hook; in other words, that the bucket fell, not because of a defective hook but because of the careless manner in which it was attached, and if that was true then the company would not be liable to Mr. Luck for his injury, because the negligence would not be that of the company but would be that of a fellow servant, a man working with him and for which the company would not be liable."

"Third. It is claimed that because this hook had been in use for some considerable time on this work, and that Mr. Luck knew that fact, he is chargeable—or that he assumed the risk of damage or injury to himself, from the use of that hook. Now, unless Mr. Luck was charged with the duty, or had the authority, to provide this hook and instrumentality for lowering this bucket he had a right to presume that the company had discharged its duty and exercised reasonable care in providing instrumentalities, and he did not assume the risk of using this instrumentality unless he knew that they were unsafe and improper, and appreciated the danger from using them, or unless the danger was so obvious and apparent that any reasonable man would have refused to work in the well where this bucket was being lowered, or would have complained to the company on account of the defective hook."

I submit that the foregoing fully presents the law of the case so far as the requested instruction is concerned.

The jury was told that in order to return a verdict for the plaintiff they must find (1) that the hook was

not a reasonably safe appliance—or such a device or appliance as a reasonably prudent man would have selected and, (2) that the accident was not due to the negligence of a fellow servant, and (3) that the risk had not been assumed by plaintiff, and the court explained to the jury that if the plaintiff knew the dangerous character of the hook, or such character was so obvious and apparent that a reasonable man would have observed it, or if the selection of the hook was a part of the plaintiff's duty or he had the right to select the hook to be used, he could not recover. These instructions fully presented to the jury the doctrine of proximate cause.

“The Proximate Cause” said the Supreme Court of the United States in *Insurance Co. vs. Boon*, 95 U. S. 130 “is the efficient cause, the one that necessarily sets the other causes in operation.” Strictly speaking, the request did not embody the law, for it defined “proximate cause” to be “that cause which conducted directly to the accident and without the accident would not have occurred.” That, I submit was not a correct definition in the circumstances. There were several causes “without which the accident would not have occurred.” For instance, the bucket struck the top of the casing. If the casing had not been there, the accident would not have occurred; if the bucket had not struck the casing, the accident would not have occurred. The proximate cause was the negligence of defendant in providing a hook that was not reasonably safe; that was “the efficient cause” which “necessarily set the other causes in operation.” And the Court clearly instructed the jury in what circumstances defendant would be liable in case they found the hook not to have been a reasonably safe device and that defendant provided it. What assistance

would it have been to the jury to have hurled the words "proximate cause" at them? In truth the word is not a suitable one for the jury; it is one rather to be employed in legal opinions and discussions.

I respectfully submit that the judgment should be affirmed.

C. W. FULTON,
Attorney for Defendant in Error.

THE KATALLA COMPANY,
a Corporation,
Plaintiff in Error.

vs.

JOHN P. JOHNSON,
Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the United States District Court
for the Western District of Washington,
Northern Division.

No.

THE KATALLA COMPANY,
a Corporation,
Plaintiff in Error.

VS.

JOHN P. JOHNSON,
Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the United States District Court
for the Western District of Washington,
Northern Division.

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*In the United States Circuit Court, Ninth Circuit, Western
District of Washington. Northern Division.*

JOHN P. JOHNSON, <i>Plaintiff and Defendant in Error.</i>	}	No. —.
VS.		
THE KATALLA COMPANY, a Corporation,		
<i>Defendant and Plaintiff in Error.</i>		

NAMES AND ADDRESSES OF COUNSEL.

MARTIN J. LUND, Esq.,
359 Arcade Building, Seattle, Washington. Attorney for De-
fendant in Error.

L. BOGLE, Esq.,
610 Central Building, Seattle, Washington. Attorney for
Plaintiff in Error.

CARROLL B. GRAVES, Esq.,
610 Central Building, Seattle, Washington. Attorney for
Plaintiff in Error.

F. T. MERRITT, Esq.,
610 Central Building, Seattle, Washington. Attorney for
Plaintiff in Error.

WM. H. BOGLE, Esq.,
610 Central Building, Seattle, Washington. Attorney for
Plaintiff in Error.

*In the Superior Court of the State of Washington for the
County of King.*

JOHN P. JOHNSON,

Plaintiff,

vs.

THE KATALLA COMPANY,

a Corporation,

Defendant.

No. 1940.

Complaint.

The plaintiff complains and alleges:

I.

That the defendant above named now is and at all the time herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of New York, and doing business in the State of Washington, and having its principal office in King County, Washington, and was engaged in the construction of the Copper River & Northwestern Railroad near Copper River, Alaska. That on the 25th day of May, 1910, the plaintiff was employed as a laborer on the construction of said road at a place about one hundred and twenty-three miles from Cordova, Alaska, and the work was rock work, the rock being blasted and removed by the use of dynamite, which was furnished by the defendant for that purpose.

II.

That at said time the defendant negligently and carelessly furnished the men working with the plaintiff and in his immediate neighborhood, dangerous, unsafe, defective and extra hazardous dynamite for use by them in blasting, in this, to-wit: That the dynamite so furnished was more than two years old and by reason thereof unsafe to use and liable to explode prematurely, though handled ever so carefully. That the dynamite so furnished by the defendant had further been exposed to the air, wind, rain and snow, heat and cold, before it was given to the men for use, thereby rendering it extra dangerous, unsafe

to use and liable to explode prematurely, though handled ever so carefully. That the age of said dynamite and its extra dangerous condition by reason thereof was well known to the defendant, but unknown to the plaintiff and the men using the dynamite and to whom it was furnished by defendant; that the said dynamite had been exposed to the elements and its extra dangerous condition by reason thereof was well known to the defendant, but unknown to the plaintiff and the men using the dynamite and to whom it was furnished by defendant. That said defendant negligently and carelessly failed and neglected to inform the plaintiff and the men using said dynamite of the extra dangerous condition of the same.

III.

That on said 26th day of May, 1910, the men working with the plaintiff were loading a hole in the rock with the dynamite so furnished by the defendant, in a proper and careful manner and while they were so doing, the dynamite exploded prematurely by reason of its extra dangerous and unsafe condition, caused as heretofore alleged, and without warning and near the place where the plaintiff was working causing the injuries hereinafter alleged.

IV.

That the force of said explosion caused a large rock to fall on the plaintiff, causing great injury in and to his whole body and particularly to his chest, legs and right foot, causing a cut in his head and the fracture of several ribs and crushing his right foot. That by reason of such injuries he was removed to the hospital, where he remained until the 23d day of June, 1910, and he suffered great pain and he still suffers great pain and will always suffer great pain by reason of said injury, and has since been unable to earn any money and to do any work and will remain a cripple and unable to do any work for the remainder of his life. That at the time of the injury he was thirty-seven years of age, a common laborer by occupation and earning and able to earn \$4.50 per day, and that by reason of all the facts aforesaid the plaintiff has been damaged in the sum of twenty-five thousand dollars (\$25,000.00).

Wherefore, the plaintiff demands judgment against the defendant in the sum of twenty-five thousand dollars (\$25,000.00) and costs of suit.

MARTIN J. LUND,
Attorney for Plaintiff.

State of Washington,
County of King.—ss.

John P. Johnson, being first duly sworn, says that he is the plaintiff in the above entitled action, that he has heard the foregoing complaint read, knows the contents thereof and believes the same to be true.

JOHN P. JOHNSON,

Subscribed and sworn to before me this 30th day of November, 1910.

MARTIN J. LUND,

Notary Public in and for the State of Washington, residing at Seattle.

Filed December 19, 1910. D. K. Sickles, Clerk.

Indorsed: Complaint. Filed U. S. Circuit Court, Western District of Washington, January 5, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

*In the United States Circuit Court, Ninth Circuit, Western
District of Washington, Northern Division.*

JOHN P. JOHNSON,	} <i>Plaintiff,</i>	No. 1940.
vs.		
THE KATALLA COMPANY, a Cor-	} <i>Defendant.</i>	Answer.
poration,		

Answering the complaint herein :

I.

Defendant admits that it was and is a corporation duly organized and existing under the laws of the State of New York, with its principal office in King County, Washington, as alleged in paragraph I of the complaint, and that plaintiff was employed as a laborer on the construction of the Copper River & Northwestern Railroad near Copper River, Alaska, on or about the 26th of May, 1910, at the point alleged in the complaint, and that rock was being blasted by the use of dynamite in the construction of the road; and denies each and every other allegation, matter and thing and each and every part and portion thereof in said paragraph I stated.

II.

Denies each and every allegation contained in paragraph II of the complaint.

III.

Denies generally each and every allegation, matter and thing in paragraph III of the complaint stated.

IV.

Admits that plaintiff received certain injuries by reason of an explosion of dynamite on said work on or about the 26th day of May, 1910, and denies generally each and every other

allegation, matter and thing, and each and every part and portion thereof in paragraph IV of the complaint stated.

For its first affirmative defense, defendant alleges:

That said injuries were owing to the fault and negligence of plaintiff himself.

For its second affirmative defense, defendant alleges:

That after plaintiff received the injuries complained of, and before the commencement of this action, plaintiff for a valuable consideration to him in hand paid by one M. J. Heney, fully and forever released and discharged said M. J. Heney, his principals, agents and servants from any and all liability for damages for said injuries and for any ailment, complaint, damage or harm arising or growing out of said injuries so received by the plaintiff on said 26th day of May, 1910, and while in the employ of said M. J. Heney, and did thereby fully and forever and for a valuable consideration discharge and release this defendant and all others from any and all liability or claims for damage for and on account of said injuries, which said release and discharge was in writing, duly signed, executed and delivered by said plaintiff.

Wherefore defendant prays judgment that plaintiff take nothing by this action, that the same be dismissed, and for its costs and disbursements herein.

BOGLE, MERRITT & BOGLE,

Attorneys for Defendant.

State of Washington,
County of King.—ss.

C. A. McMASTERS, being first duly sworn, on his oath deposes and says:

That he is sec'y-treasurer of The Katalla Company, a corporation, defendant in the above entitled action; and as such officer of said corporation is authorized to make this verification in its behalf; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

C. A. McMASTERS,

Subscribed and sworn to before me this 4th day of April, 1911.

(Seal.)

J. C. HARRIS,

Notary Public in and for the State of Washington, residing at Seattle.

Service of within answer this 4th day of April, 1911, and receipt of a copy thereof, admitted.

MARTIN J. LUND,

Attorney for Plaintiff.

Indorsed: Answer: Filed U. S. Circuit Court, Western District of Washington, April 4, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

*In the United States Circuit Court, Ninth Circuit, Western
District of Washington, Northern Division.*

JOHN P. JOHNSON,

Plaintiff,

vs.

THE KATALLA COMPANY, a Cor-
poration,

Defendant.

No. 1940.

Reply.

Comes now the plaintiff and for reply to the first and second affirmative defenses contained in defendant's answer herein, says:

I.

Plaintiff denies each and every allegation contained in said first affirmative defense.

II.

Plaintiff denies each and every allegation contained in said second affirmative defense.

Further replying to said second affirmative defense the plaintiff alleges:

I.

That after plaintiff's injury, as alleged in his complaint herein, he was removed to the hospital, and while he was there, the men working on the said road, by reason of plaintiff's misfortune, took up a collection of money among themselves for the plaintiff and paid the same to said M. J. Heney's agent with instruction to give it to the plaintiff, of which plaintiff was informed, and when the plaintiff was discharged from the hospital, a small sum of money was turned over to the plaintiff by said agent of said M. J. Heney, who told plaintiff that it was money collected for him by the men working on the road, and said agent produced a paper, which he stated was a receipt for such money, and asked the plaintiff to sign it. That the

plaintiff is an alien unable to read the English language, and such paper was written in English and plaintiff could not read it, and relying upon the statement of said agent, that it was a receipt for the money, which had been collected for him, as aforesaid, he signed it, and that if the paper so signed is a release, as alleged in said affirmative defense, it was signed by the plaintiff without knowing it to be such and through the fraud practiced upon him by the said agent of said M. J. Heney, and was without consideration.

Wherefore, plaintiff prays for relief as in his complaint herein.

MARTIN J. LUND,
Attorney for Plaintiff.

State of Washington,
County of King.—ss.

Martin J. Lund, being first duly sworn, says that he is the attorney for the plaintiff in this action, that he has read the foregoing reply, knows the contents thereof and believes the same to be true. That he makes this verification on behalf of the plaintiff for the reason that he is not now in the State of Washington.

MARTIN J. LUND.

Subscribed and sworn to before me this 21st day of April, 1911.

HENRY GULLIKSEN,
Notary Public in and for the State of Washington, residing at Seattle.

Service of within reply and receipt of copy admitted this 24th day of April, 1911.

BOGLE, MERRITT & BOGLE,
Attorneys for Defendant.

Indorsed: Reply. Filed U. S. Circuit Court, Western District of Washington, April 24, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

*In the District Court of the United States for the Western
District of Washington.*

JOHN P. JOHNSON,

Plaintiff,

vs.

THE KATALLA COMPANY, a Cor-
poration,

Defendant.

No. 1940.

Verdict.

We, the jury in the above entitled cause, find for the plaintiff
and assess his damages at the sum of \$7,500.00.

S. K. PAINTER, Foreman.

Indorsed: Verdict. Filed in the U. S. District Court,
Western Dist. of Washington, Jan. 11, 1912. A. W. Engle,
Clerk. By S. Deputy.

*In the United States District Court, Western District of
Washington. Northern Division.*

JOHN P. JOHNSON,

Plaintiff,

vs.

THE KATALLA COMPANY, a Cor-
poration,

Defendant.

No. 1940.

Petition for New
Trial.

Now comes the defendant and petitions and moves the Court to grant a new trial of the above entitled action, and, as ground for such petition, assigns the following causes materially affecting its substantial rights, to-wit:

I.

Insufficiency of the evidence, in the following particulars, to justify the verdict:

1. That the negligence charged against the defendant was not shown by the evidence.

2. There was no evidence that the explosive which was discharged to the injury of plaintiff was defective or extra hazardous, or was more dangerous to handle than like explosives of the usual composition and of high explosive nature.

3. That there was no evidence that the explosion was caused by reason of any defective or extra dangerous condition of said explosive, but the evidence affirmatively showed that the quality of the explosive was such that it would not discharge prematurely, or from slight jars or rough handling.

4. The evidence did not disclose the cause of the explosion at the time the plaintiff received his injuries, and there was no evidence of facts from which the jury could draw any inference as to the cause of the explosion, and the finding of the jury was based on mere conjecture and guess.

5. There was no evidence that the explosive was extra dangerous or defective when it was furnished by the defendant,

and no evidence was offered regarding its character and condition when it left the possession of defendant, and there was no evidence tending to show that the defendant did not exercise the care in furnishing the explosive to M. J. Heney required by the instructions of the Court.

6. The verdict was against the law and the evidence, in this, that the Court charged the jury that the only duty of the defendant was to use ordinary care to see that the explosive sold by it was not extra hazardous or unnecessarily dangerous, and there was no evidence to show or that tended to show, any such lack of care.

7. There was no evidence that any contractual, or other, relation existed between the plaintiff and the defendant which imposed upon the defendant any greater duty than to observe the same degree of ordinary care that one person should observe for the safety of every other person, and there is no evidence of any failure on the part of defendant to observe such ordinary care.

8. The evidence failed to show the agreement or contract between the defendant and M. J. Heney under which the explosive was furnished, and that it appears that Heney and his agent had as full opportunity of knowing the character and condition of such explosive as defendant had, and the evidence wholly fails to show that Heney and his agents did not receive and undertake the use of such explosive with full knowledge of its character and condition if such explosive was in any respect defective at the time it was delivered by the defendant.

9. The evidence fails to show that the act of defendant in selling the explosive to Heney was the direct and proximate cause of the injury to plaintiff, because, if the explosive was defective, it appears that Heney, his agents and sub-contractors, with full opportunity to inspect and know the character of such explosive, voluntarily assumed to use said explosive and exposed the plaintiff to danger, and such act was the direct and proximate cause of the injury to plaintiff.

10. There was no evidence tending to show the natural character of the dynamite or blasting powder which the sub-contractor was using on the day of the accident, as to whether it

was by its original composition and combination a highly explosive and dangerous powder and liable to be suddenly exploded while being used solely on account of its highly explosive and naturally dangerous character.

II.

Errors in law occurring at the trial and excepted to at the time, as follows:

1. The denial of the motion of the defendant that the Court peremptorily instruct and direct the jury to return a verdict in favor of the defendant.

2. The instruction given by the Court as follows:

"Now there is no evidence as to under just what arrangement the Katalla Company issued this dynamite which came into the possession of Heney and was carried to this location. Whether it was furnished because it was part of the contract that it should be furnished, or whether it was sold, we do not know. The evidence does not show.

"It is the law, however, that if the owner of a railroad company engaged in constructing a railroad, lets out a general contract for the construction of the road, knowing that that contract has been let, and that a large number of men are to be employed or have been employed, in the actual work of construction, furnished the explosive to be used by the individuals who are to actually do the definite construction work, it is the duty of the railroad furnishing the explosive under these circumstances to exercise ordinary care to see that the explosive furnished is not unnecessarily dangerous."

3. The following instruction of the Court, which was given as an addition to defendant's request numbered 1, to-wit:

"This is not intended to qualify what I have already said, that if there was a general contract for the construction of the road and the defendant company having made that contract had knowledge of it, then when furnishing the dynamite to be used in the construction of the road, it would be subject to the obligation to use ordinary care, as I have already stated."

4. The refusal of the Court to give the following part of defendant's requested instruction numbered 2, to-wit:

“If the Katalla Company furnished unsafe explosives to said contractor, and the contractor knew the unsafe character of such explosive, or by reasonable inspection could have determined its character, and with such knowledge said contractor purchased from the Katalla Company such explosives, and an accident occurred in the use of the same, then the Katalla Company would not be liable, but the direct and proximate cause of such an accident would be the act of the contractor in using, or furnishing for use, such unsafe explosive.”

5. Ruling of the Court in permitting the witness, A. B. Laucks, to answer the hypothetical question propounded by the plaintiff, calling for witness's opinion as to what caused the explosion at the time of the plaintiff's injury .

III.

Excessive damages appearing to have been given under the influence of passion or of prejudice.

Dated this 18th day of January, 1912.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

Service of within petition this 18th day of January, 1912, and a receipt of a copy thereof, admitted.

MARTIN J. LUND,
Attorney for Plaintiff.

Indorsed: Petition for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, Jan. 19, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the United States District Court, Western District of
Washington. Northern Division.*

JOHN P. JOHNSON,	} <i>Plaintiff,</i>	No. 1940.
vs.		
THE KATALLA COMPANY, a Cor- poration,		
	<i>Defendant.</i>	Order.

Upon the motion and application of the defendant therefor, it is ordered that the time for preparing, presenting and filing the defendant's Bill of Exceptions in this case be, and the same is hereby extended until the 1st day of April, 1912.

Dated February 19th, 1912.

GEORGE DONWORTH, Judge.

Indorsed: Order. Filed in the U. S. Circuit Court, Western Dist. of Washington, Feb. 19, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the United States District Court, Western District of
Washington. Northern Division.*

JOHN P. JOHNSON,

Plaintiff,

vs.

THE KATALLA COMPANY, a Cor-
poration,

Defendant.

No. 1940.

(Circuit Court.)

MEMORANDUM DECISION AND ORDER ON MOTION FOR NEW TRIAL.

MARTIN J. LUND, for Plaintiff.

BOGLE, GRAVES, MERRITT & BOGLE, for Defendant.
DONWORTH, District Judge.

This is an action for personal injuries. The jury rendered a verdict for \$7,500 damages and the defendant has petitioned for a new trial on several grounds. I feel satisfied with the rulings made at the trial and with the charge to the jury. I also feel satisfied that the evidence is sufficient to support the verdict in all respects except the amount of damages. I have carefully considered the evidence touching the nature and extent of plaintiff's injuries and cannot lead myself to believe that there is evidence here showing \$7,500 damages. Giving to the evidence its most liberal construction consistent within reason, I conclude that \$5,700 is the largest verdict that this evidence can sustain. It is therefore ordered that if within ten days from this date plaintiff files in the clerk's office a written remission of all of the verdict and judgment in excess of \$5,700, the petition for a new trial will be denied and in the event of the failure of the plaintiff to file such remission, the petition for new trial will be granted. To this order both plaintiff and defendant except and said exceptions are allowed.

February 29, 1912.

GEORGE DONWORTH, Judge.

Indorsed: Memorandum Decision and Order on Motion for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, Feb. 29, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the United States District Court, Western District of
Washington. Northern Division.*

JOHN P. JOHNSON,	} <div style="display: inline-block; vertical-align: middle;"> Plaintiff, Defendant. </div>	
vs.		No. 1940.
THE KATALLA COMPANY, a Cor-		Order.
poration,		

This cause came regularly on to be heard in the above entitled Court upon the petition of defendant for a new trial, and the Court made an order directing the plaintiff to remit from the verdict of the jury herein the sum of \$1,800.00, and the plaintiff having filed a remission consenting that the verdict of the jury be reduced from \$7,500.00 to \$5,700.00, it is hereby ordered that defendant's petition for a new trial be and the same is hereby denied. To this order defendant excepts and said exception is allowed.

Done in open court this 12th day of March, 1912.

GEORGE DONWORTH, Judge.

Service of the within Order by delivery of a copy of the undersigned is hereby acknowledged this 11th day of March, 1912.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

Indorsed: Order Denying Pet. for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, March 12, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the District Court of the United States for the Western
District of Washington. Northern Division.*

JOHN P. JOHNSON,	} No. 1940.
vs.	
THE KATALLA COMPANY, a Cor- poration,	
	} Defendant.

In this cause, the jury having returned a verdict in favor of the plaintiff in the sum of \$7,500.00, and the defendant having filed a petition for a new trial, and the Court having made an order giving the plaintiff the option of reducing the verdict to \$5,700.00 or accept a new trial, the plaintiff hereby consents that the verdict rendered in this cause be reduced to \$5,700.00 and that judgment be entered upon such verdict as so reduced.

Dated at Seattle, Wash., March 9, 1912.

MARTIN J. LUND,
Attorney for Plaintiff.

Indorsed: Remission. Filed in the U. S. District Court,
Western Dist. of Washington, March 12, 1912. A. W. Engle,
Clerk. By S., Deputy.

*In the United States District Court, Western District of
Washington. Northern Division.*

JOHN P. JOHNSON,

Plaintiff,

vs.

THE KATALLA COMPANY, a Cor-
poration,

Defendant.

No. 1940.

Judgment.

The above entitled cause came regularly on for trial in the above entitled Court on the 10th day of January, 1912, the plaintiff appearing in person and by his attorney, Martin J. Lund, and the defendant appearing by its officers and attorneys, Bogle, Merritt & Bogle and Carroll B. Graves, Esq. A jury was regularly empaneled and sworn to try the cause. Witnesses for plaintiff were sworn and examined, and after hearing the evidence adduced and the argument of counsel and the instructions of the Court, the jury retired to consider their verdict and on the 12th day of January, 1912, the jury returned into Court a verdict in favor of the plaintiff and against the defendant in the sum of seven thousand, five hundred dollars, and the jury thereupon being called each of the jurors answered, that that was the verdict of the jury, which verdict was thereupon received and filed.

Thereafter, within the time limited by law, the defendant filed a petition for new trial, which petition came regularly on to be heard on the 19th day of February, 1912, and after argument of counsel, the Court took the consideration thereof under advisement, and on the 29th day of February, 1912, the Court entered an order denying said petition for new trial upon condition that plaintiff would remit from said verdict the sum of eighteen hundred dollars, and the plaintiff on the 11th day of March, 1912, filed a remission in this Court remitting from said verdict the sum of eighteen hundred dollars and consenting that judgment be rendered upon said verdict in the sum of five

thousand, seven hundred dollars (\$5,700.00), and plaintiff's petition for new trial thereupon being denied.

Now, therefore, by reason of the law and the premises, it is hereby ordered, adjudged and decreed, that the judgment heretofore entered in this cause in favor of the plaintiff and against the defendant for the sum of seven thousand, five hundred dollars (\$7,500.00) be and the same is hereby vacated and set aside, and that the plaintiff have and recover from the defendant the sum of five thousand, seven hundred dollars (\$5,700.00) with interest thereon at the rate of six per cent. per annum from date hereof until paid and costs of suit taxed in the sum ofdollars and that execution issues therefor.

To this order and judgment the defendant excepts and said exception is allowed.

Done in open court this 12th day of March, 1912.

GEORGE DONWORTH, Judge.

Service of the within judgment by delivery of a copy to the undersigned is hereby acknowledged this 11th day of March, 1912.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

Indorsed: Judgment. Filed in the U. S. District Court, Western Dist. of Washington, March 12, 1912. A. W. Engle, Clerk. By S. Deputy.

*In the District Court of the United States, for the Western
District of Washington. Northern Division.*

JOHN P. JOHNSON,	} <i>Plaintiff,</i>	No. 1940.
vs.		
THE KATALLA COMPANY, a Cor- poration,		
	<i>Defendant.</i>	Order.

The above entitled cause coming on for hearing before this Court, on motion of Bogle, Graves, Merritt & Bogle, attorneys for the defendant, for an order extending the time within which to file a Bill of Exceptions, and said motion having been heard, and good cause shown why the time should be extended, the plaintiff consenting thereto,

It is therefore ordered that the time within which defendant may file its Bill of Exceptions in this cause be, and the same is hereby extended to and including April 10, 1912.

Done in open court this 26th day of March, 1912.

C. H. HANFORD, Judge.

O. K. MARTIN J. LUND, Attorney for Plaintiff.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, March 26, 1912. A. W. Engle, Clerk.
By S., Deputy.

*In the District Court of the United States, for the Western
District of Washington. Northern Division.*

JOHN P. JOHNSON,

Plaintiff,

vs.

THE KATALLA COMPANY, a Cor-
poration,

Defendant.

No. 1940.

Order.

Upon motion and application of the defendant therefor, and
the plaintiff consenting thereto;

It is ordered that the time for preparing, presenting and
filing the defendant's Bill of Exceptions in this case be, and the
same is hereby further extended from the 10th day of April,
1912, until and including the 20th day of April, 1912.

Dated April 6, 1912.

C. H. HANFORD, Judge.

Indorsed: Order. Filed in the U. S. District Court, West-
ern Dist. of Washington, April 8, 1912. A. W. Engle, Clerk.
By S., Deputy.

*In the United States District Court for the Western District of
Washington. Northern Division.*

JOHN P. JOHNSON,	} No. 1940.
<i>Plaintiff,</i>	
VS.	
THE KATALLA COMPANY, a Cor-	}
poration,	
<i>Defendant.</i>	

BILL OF EXCEPTIONS.

Be it remembered that on, to-wit, the 10th day of January, 1912, during a stated term of said Court begun and holden in the City of Seattle, in and for the Western District of Washington, before the Honorable George Donworth, District Judge, the issues joined in the above stated cause between said parties came on for trial before the said Judge, sitting with a jury of twelve persons, duly and regularly sworn and empaneled, the plaintiff being represented by Martin J. Lund, Esq., and the defendant being represented by Messrs. Bogle, Graves, Merritt & Bogle, its attorneys, and upon the trial of said issues, the following proceedings, among others, were had, namely:

Plaintiff, in order to maintain the issues on his part, called the following named witnesses, who, being severally duly sworn, severally testified as follows:

E. E. SIEGLEY, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

BY MR. LUND:

Q What occupation or position do you occupy now?

A Executor of the M. J. Heney estate.

Q During the life of Mr. Heney, what position did you occupy?

A I was his confidential clerk.

Q His secretary?

A Yes.

Q Have you in your possession a contract made between Mr. Heney and The Katalla Company?

A I have a copy of it.

Q You were served with a subpoena duces tecum to bring that contract with you?

A Yes.

Q Why didn't you do so?

A I did. I have brought all that we had.

Q All that you had?

A All that we had.

Q Didn't Mr. Heney ever have the original or the duplicate of the contract?

A Well, this is a duplicate, I presume, but it is not marked that way. This is the only thing I ever had in my possession. As regards the other contract, I don't know, I presume the original is out with the company, I don't know. That is the only one I have seen (showing).

BY MR. GRAVES:

Q Mr. Siegley, this paper which you have produced is all in typewriting—the signatures, too?

A Yes.

Q It is a copy then?

A I presume it is a copy. I don't think I have ever seen the original of the 1908 contract. We have one of the originals of the 1909 contract. There were two contracts.

Q There was an original contract and then you say there was a subsequent contract?

A Yes.

Q All you know anything about a contract covering the year 1910 is simply that you find a copy like this in your files?

A That is the only one I had in my possession.

Q And you have never compared it with the original?

A I never have.

Q Have you ever seen the original?

A I don't know as I have; I may have, but I can't remember that I have.

Q Can you say now that this is a true copy of the original, of your own knowledge?

A Well, I can't say, because I don't know as I have ever seen the original contract. That is the only one I have ever seen.

Q (Mr. Lund) This is the contract dated January, 1909?

A Yes.

Q That is the second contract?

A That is the contract covering this portion of the work.

Q In 1910?

A 1909, 1910 and 1911.

Q This is the contract—what can you say as to whether or not this is the contract that you have followed in dealing with The Katalla Company?

MR. GRAVES: I object to that.

Q (Mr. Lund) You have refused to give me any information whatever in this matter?

A I was subpoenaed in the case and I was not supposed to give any information except on the stand. I am willing to give any information on the stand.

Q When I went down to talk to you, you could not give me any information?

A There are some points I had no right to discuss in regard to the matter that I can see.

Q And you say that this is the only contract that you have in your possession?

A That was the only one I had in my possession.

Q And this is the copy which you followed and went by in your dealings with the company?

A So far as my dealings with the company, I didn't need any copy at all. My dealings with the company up to the time that the work was being done, I didn't need any contract—my work didn't necessitate any contract.

Q As far as you know, to the best of your knowledge and belief and judgment, this is a true copy of the original contract?

A So far as I know, yes.

MR. LUND: Now, if your Honor please, about a week, or several days ago, I served upon counsel a notice—I am now

offering this in evidence and I want to make the statement to the Court, that some days ago I served upon the attorneys of record for the defendant company this notice (reading notice). I served that notice upon the attorneys, and Mr. Graves informs me that he has not got the original here.

MR. GRAVES: The company's office is in New York City and this was served upon us four days ago, and the only contract referred to by this notice is in the office in New York City and we have no means of getting it here at the time requested by counsel.

MR. LUND: It seems to me that upon the statement of the witness that to the best of his opinion it is a true copy, we are entitled to offer the copy in evidence.

MR. GRAVES: We object to the reception of it on the ground that it is not shown to be a copy of the contract called for by this notice. The notice, if your Honor please, reads as follows: (Reading notice.) There has been no showing that this is a copy of that contract.

MR. LUND: I will waive the question at this time and will have Mr. McCord here in the afternoon. You may be excused, Mr. Siegley, temporarily, but you may remain in attendance.

(Witness excused.)

JOHN P. JOHNSON, plaintiff, produced as a witness in his own behalf, being first duly sworn, testifies as follows:

Q (Mr. Lund) You are the man that is bringing this suit?

A Yes.

Q What is your nationality?

A Finlander.

Q What is your occupation?

A Mining.

Q In the spring of—or in April, 1910, what were you doing?

A I was working in Alaska in the Copper River Railroad.

Q When did you get up there?

A The 16th of—left here the 16th of March.

Q 1910?

A 1910, yes.

Q And you arrived in Alaska at what time?

A 16th of March, 1910, we left here.

Q And you arrived in Alaska about three days afterwards?

A 24th of March, 1910, we were in Cordova.

Q You came to Cordova?

A Yes.

Q In going up there, what people did you see and talk with in Seattle in reference to going up there?

A We go to work there.

MR. GRAVES: I shall object to that on the ground that it is immaterial. The allegations of the complaint are simply a charge that this company furnished this particular powder. The terms of employment between him and any one else is a matter that is foreign to the issue.

MR. LUND: It is alleged, your Honor, that the defendant was engaged in the construction of the particular railroad in question, and that this man was employed in working upon that road and while he was so employed they furnished to him for use this defective powder. I expect to show under the examination all the relations that existed between those parties.

MR. GRAVES: There is no allegation here of employment. The point I desire to make here is that we are not here to meet any allegation other than the furnishing of this powder. Your Honor will remember this matter came up on the demurrer to the complaint, and the plaintiff, after the argument upon that point, declined to amend his complaint so as to allege any contractual relations between this plaintiff and the defendant, relying solely upon the proposition that the defendant had negligently furnished a dangerous explosive when it knew that this explosive was to be used by these parties in the construction of the work. The proposition, therefore, intended by this objection is this: That we are here to meet that issue, regardless of the relations between the parties, and that we are not here prepared to meet the question or to try out the issue upon a liability arising by reason of any contractual relation existing between this man and the defendant. Now counsel is proposing to go into and establish by the testimony of this witness some

sort of relationship between The Katalla Company and this witness. If that is to be the issue, then we are not prepared to meet it, because the complaint was not framed in that way and the issues are not framed. (Counsel for the defendants argues the objection at length to the Court.)

MR. LUND: May it please your Honor, counsel's statement is partly correct and partly not correct. Counsel is mistaken in some parts of his argument, which will appear by a glance at the complaint. At the time the demurrer was argued it is true I relied entirely upon that principle alone which holds that a man who furnishes an instrumentality which in its inherent danger, like an explosive, is liable to all the world for his negligence in that respect without reference to any relation between the parties whatsoever, but since that argument I have had occasion to look very thoroughly into what the law is, and that is one of the principles upon which I relied. The main principle upon which I relied is clearly stated in my complaint (reads paragraph I of the complaint to the Court). Here we have the relation which I am contending for; that any corporation or man who is interested in any way in the prosecution of any work, in the doing of any thing, and he agrees to furnish a certain instrumentality for the doing of that work, he is liable for his negligence in doing that, in furnishing that which he agrees to furnish and which he furnished, to anyone who is employed on the work, whether he is master or servant or whatever the relation is, and I have an abundance of authorities to support it, but I haven't got my books here, but such is the law beyond question.

THE COURT: As I understand the point to be argued at this time is whether there were any allegations in the complaint that make the question which you have now asked germane to the case; that is what I would like to hear from you on.

MR. LUND: I am going to show that that man was employed to work on their road, and how his employment came about and all about it.

THE COURT: I thought that you proposed to show that he was employed by the defendant—that the complaint does not state that as a cause of action.

MR. LUND: No, sir; such is not my intention.

MR. GRAVES: If your Honor please, we are taken by surprise by the proposition last stated by counsel and in which he makes himself plain now, that is he proposes to show, as I judge by his opening statement and I can't understand anything else than, by this question he proposes to show that there was some arrangement here by which this plaintiff was employed and induced to labor by The Katalla Company—am I correct in that?

MR. LUND: No, I don't intend to do so.

MR. GRAVES: Then my objection is that it is immaterial what arrangement he had, or talk he had here, and that objection is still well taken, I take it, being entirely foreign to the issue and tending to bring something into the trial that is foreign to the issue.

MR. LUND: My purpose, may it please your Honor, it to show that this man was there by right; that he was there and engaged in doing that work; that is what I intend to show.

THE COURT: We are wasting time, gentlemen. The question is "What persons he talked to." Well, he might have talked to a hundred friends and relations and others and it would be all immaterial. If you can show his employment, you may show that.

Q (Mr. Lund) Tell us, Mr. Johnson, what if any arrangement was made here in Seattle between you and any other person in reference to working on the Copper River Road?

A No—nothing here.

Q What arrangement—was there any arrangement whatsoever?

A No—nothing here.

Q Well, I want you to tell what took place here in Seattle before you went to Alaska, if anything?

MR. GRAVES: I object to that as immaterial. He said there was no arrangement made here whatsoever.

A We were leaving—

THE COURT: I will overrule the objection.

A (Continuing) —we left—nine together—at Roslyn,

B. C., and we came here and went there together to the company's office and got the tickets and go over there.

Q You got the tickets?

A Yes.

Q And went on the boat?

A Yes.

Q What if anything was said between you and any gentleman here in reference to working up there?

A No.

Q Was there anything said whatsoever?

A No, never nothing said at all to me.

Q There was nothing said?

A No.

Q And then you came to Katalla—what did you do there?

A Cordova.

Q To Cordova?

A We went to the hotel and next day we get our pass away up to Tiekill.

Q Who gave you the pass?

A One of them Katalla company.

Q Speak so that we can hear you.

A One of them Katalla Company's agents.

MR. GRAVES: I move to strike that. He can state who it was and where it was.

MR. LUND: That may be stricken.

Q Where did you get the pass?

A Right in the office at the wharf.

Q In whose office was it?

A Katalla Company's office.

Q And what was said when they gave you the pass?

MR. GRAVES: I object to that.

A He didn't say anything.

MR. GRAVES: I object to this, may it please your Honor.

MR. LUND: There is no intention of showing any employment, and if such should appear it may be stricken.

MR. GRAVES: Then I object to it as immaterial.

THE COURT: When an objection is made to any question the witness must not answer until the Court has directed

him to. I do not see the materiality of the conversation between the agent on the wharf and the plaintiff at that time, under these pleadings.

MR. LUND: Well, I will change that question so as to limit it.

Q What was said between you and the man there in reference to getting work?

MR. GRAVES: I object to that. This is immaterial and the witness should not be permitted to relate any chance conversations. We have no means of knowing with whom those conversations were held; whether it was the agents of the steamship company or the agents of the Katalla Company or the agents of M. J. Heney Company or whom it was with. Counsel said he had no intention to prove any employment by us and, therefore, any conversation had is immaterial and may be prejudicial.

THE COURT: As I understand it, one of the issues in the complaint, arising from the complaint and answer, is whether the defendant company was building that railroad. That is denied. It is alleged in the complaint and denied by the answer. Any testimony bearing on that point is, therefore, material as I view the case.

MR. GRAVES: If your Honor please, whether this Katalla Company, was building the railroad is denied; but this method of proof—by a mere local agent on the wharf making a statement—does not prove that the Katalla Company was constructing this railroad. We might go into our general knowledge of the fact that there were two companies up there constructing different roads that had their landing at Cordova.

THE COURT: What is the purpose of that question, Mr. Lund?

MR. LUND: The purpose of the question, as I understand—the witness—he is a foreigner and it is a little hard to get the facts from him—he says that he went to Cordova and that he was given a pass and told by The Katalla Company to go up to a certain station and there he would get work and that his wages would be so much, and that in following out that arrangement he went up to a certain station and got work and

started to work. That is my understanding of what the evidence will be.

THE COURT: I will overrule the objection on the ground that the connection of the defendant company with the railroad is denied by the answer, and the proof of what the company was doing there on the ground and what the agent said in connection with this matter is material under that issue.

(Exception noted for defendant.)

Q What was said there, Johnson, when you got your pass, between you and the man that you got it from, in reference to your going anywheres and getting work?

A He didn't say nothing else to me. He said he passed me my meal ticket and when they call "49" we eat our dinner down there—we get our dinner down there at "49"—forty-nine miles from Cordova.

Q You got your dinner there?

A Yes.

Q How did you come to go in that direction—go ahead and tell us in your own way how you came to go there and how you started to work—tell us about it, Johnson—tell me about it?

A Then we helped to carry the powder a little while in The Katalla Company board house.

Q I don't understand you—you went from Cordova to "49"?

A Yes.

Q On the train as a passenger?

A Passenger, yes.

Q On the pass you got?

A Yes.

Q And they gave you a meal ticket?

A Yes.

Q And you got a meal there?

A Yes.

Q And then what did you do there?

A After we eat our dinner we went past the river on the ice.

Q You went across the river on the ice?

A Yes, and then we were on the other side of the river—we helped carry powder there.

Q You helped to carry powder?

A Yes.

Q And for how long?

A About pretty near an hour—one hour.

Q And then after that what did you do?

A We went in a box car—they had us to go in a box-car and we go to Tiekill.

Q You went in the box-car to Tiekill?

A Yes.

Q What time did you get up there?

A Three o'clock that night.

Q What did you do in Tiekill?

A We were there three days.

Q Well tell me what did you do during those three days?

A Nothing.

Q Was there any arrangement or contract or agreement?

A No, no. We couldn't get any stuff up the river—they were waiting for the boat.

Q They were waiting for the boat to come up?

A Yes.

Q Did you have any talk with any men there with references to going to work anywhere?

A No, I didn't, but the other fellows, partners of mine, had a talk.

Q Your partner?

A Yes.

Q And then after three days where did you go?

A We left there and went up to "119."

Q That was mile 119 from Cordova?

A Yes.

Q And what was going on there?

A There was station work there.

Q Station work?

A Yes.

Q Station work is where several men together are taken and stationed to do a certain section of the road, is it?

A Yes, nineteen together.

Q What's that?

A There was nineteen men there together.

Q There was nineteen men together?

A Yes.

Q That had contracted to construct that particular section?

A Yes.

Q "119."

A "119," yes.

Q And what did you do when you got up there?

A I started drilling.

Q You started drilling there?

A Yes.

Q Well, how did you come to start drilling?

A We had a pass up there and as soon as we went there they put me to work there.

Q Who put you to work?

A The foreman.

Q The foreman put you to work?

A Yes.

Q The foreman of that particular section put you to work?

A Yes.

Q How long did you work there?

A I worked twenty-six days.

Q Drilling?

A Yes.

Q And then after that what did you do?

A I quit then and I went to "123."

Q What time did you quit there?

A I quit on the 27th.

Q What time?

A 27th, I quit—I work on the twenty-six days in there and then I quit next day.

Q You worked twenty-six days and you quit on the twenty-seventh?

A Yes.

Q What day of the month was that, do you remember—well I will ask you another question. Where did you go after you quit?

A We went to "123."

Q To "123"?

A Yes.

Q Station "123"?

A Yes.

Q How long did you work there?

A Two days and a half before the explosion.

Q And what day did the explosion occur?

A On the 26th of May.

Q 1910?

A Yes.

Q During the two days and a half you had been there before the explosion what had you been doing?

A I was drilling.

Q You had been drilling?

A Yes.

Q Now can you tell us in your own way how that explosion occurred and what happened?

A The fellow come in with the powder and loading stick and they were loading—I don't know how it happen, but we were loading the hole when it went off.

Q What were you doing?

A I was lying down at the time.

Q How far from the place where they were loading the hole?

A Twelve or thirteen feet.

Q And who was drilling with you?

A This Fred Johnson.

Q Was there any other man with you in your gang; in the drilling gang?

A No, not in the same drill.

Q What was Fred Johnson doing?

A He was turning the steel and I am hammering.

Q Who else was in there beside you two?

A Ed Carson—he was hitting, and another fellow, I don't remember the names.

Q What were they doing?

A Ed Carson was drilling.

Q While you were doing that, you say two men came in with the dynamite and the loading stick?

A Yes.

Q Who were they?

A Ed Riley and Triggs.

Q What was their position, what were they doing there on the work?

A They were supposed to be night-time blasting.

Q What connection did they have with the work otherwise—how did they come to be there?

A I don't know.

Q There was two classes of men there, wasn't there—one class that was working on the station—the station-men that had the contract?

A Yes.

Q And there was another class that was working for those stationmen, wasn't there?

A Yes.

Q You understand me?

A Yes. We had 45c an hour.

Q What was your position; were you in on the contract or how?

A No. I work day's pay.

Q You worked for day's wages.

A Yes.

Q Now those two men that came in with the powder and started to load the hole, were they the same as you?

A No, they were the contract.

Q They were contractors on that station, and what appliances—what did they bring with them to load the hole with?

A Powder and wooden loading-stick.

Q How did they go ahead in loading the hole?

A Another fellow got the knife—he is cutting into the powder and Ed Riley shove it in.

Q Shove it in with the loading-stick?

A With the loading-stick.

Q What is the ordinary way of loading powder into the holes?

A Some one have the wooden stick.

Q What have you to say whether the way they were doing it is the ordinary and safe way to load dynamite?

A That is the only way they put the powder in.

Q That is the only way they put the powder in?

A Yes.

Q And when they were doing this what happened?

A There happen explosion.

Q And what explosion?

A I don't know.

Q You don't know what exploded?

A No.

Q But an explosion happened?

A Yes.

Q And what happened to you?

A I heard a shot went off and then I was a little while after that, I don't know how long, I was under the rock—a big rock.

Q You heard the shot go off and then a little while after that you didn't know anything and then you found yourself under a big rock?

A Yes.

Q How big a rock was that?

A About three feet long and two foot high.

Q Come down here and show the Court and jury how the rock got on top of you?

A (Illustrating) I was against the wall like this and the rock was on my foot and chest and hit me here on the top of the head at the same time and I push the rock away, but I couldn't push him this way (showing) I have to turn him that way so that I get my foot loose, and I turn out from under it.

Q Did you get away from the rock yourself?

A Yes, I got out myself.

Q And how long were you under the rock?

A I could not tell.

Q After you got away from under the rock what did you do?

A I was twelve foot higher than on the track and I thought I would let me fall down so that I could get out of there, but my foot was bleeding so bad and I was afraid to fall down.

Q You were afraid to fall down?

A Yes, and I look around like this and I don't see nobody only I see a little of Fred Johnson's head in the muck.

Q You saw Fred Johnson in debris?

A Yes.

Q And then what happened?

A Then I went on my hands and knees and when I got over his foot he says: "oh, my leg." He says and "It was cut to pieces." And I says: "Nothing the matter with your leg—your foot's all right." I told Fred, and I says: "I hurry up and I get those other fellows out of the muck, under the dirt," and he never answer me—he couldn't hear me—he never answer me at all, and then I see some fellow back there and holler, at the mouth of the tunnel.

Q You saw another man at the mouth of the tunnel?

A Yes, and he is coming in, and I put my hands like this and he help me out and he said: "Sure," and he take hold with me and carry him out.

Q And left you where?

A I was laid down on the track.

Q How long did you lay there?

A I don't know how long I was there, I could not tell how long, but long enough to get those other fellows out of the muck.

Q How was your feeling as to pain all this time?

A I was sick and my side was sick, and hold up my foot like this, tied up, and one fellow took the bandage and tied up my foot here, it was bleeding so much—I was pretty sick.

Q One man took a handkerchief and tied up your foot?

A Yes.

Q Tell us what you did and what was done?

A I told them fellows, I said, "Hurry up and get them other fellows out of the muck."

Q I asked you what did they do with you, Johnson, tell us what was done with you?

A I ask them to get—

Q After they got the others out?

A After they get them other fellows out they put me on the bar and carry me to the hospital.

Q Put you where?

A On the bar—a kind of plank—and carry me to the hospital—four men.

Q On a stretcher?

A Yes.

Q Where was the hospital?

A About a mile from the tunnel.

Q What kind of a structure was it—was it a building or a tent?

A A tent.

Q And who was in charge of the hospital?

A There was two nurses.

Q Men or women?

A Men.

Q And what time of day did you get over there?

A I don't look at the time. It was pretty near four o'clock, I guess.

Q And the injury happened about what time of day?

A It was between one and two o'clock in the afternoon.

Q What doctor was there at the hospital?

A At the time that they carry me in I met the doctor on the road; he went up to the tunnel to see them other fellows and he look at me but he don't say nothing, and the doctor was coming back again after they get them all out, and he come and fix up my foot.

Q Was your foot fixed up in the hospital after you got there?

A No—not before the doctor come back.

Q What time did he get back?

A He come back about a little after four o'clock, I guess—I am not sure—I don't look at the time.

Q What was done to your foot when he came there?

A They wrapped my foot in some kind of stuff and carry me in the bed.

Q Until he came hadn't you been in bed before?

A No, I was on the table, lying on the table.

Q Until the doctor came?

A Yes.

Q And then they bandaged your foot and carried you to bed?

A Yes.

Q And what was done to your side and ribs?

A They didn't do nothing. I told them "Something in my side"—

MR. GRAVES: I object to that.

Q (Mr. Lund) Nothing was done to your ribs—how long did you remain there in the hospital—how long were you there?

A It happened on the 26th of May and then I left there on the 19th of July, 1910.

Q And you left there in July, what date?

A 19th.

Q During the time you were there, where were you—in bed or were you up?

A In bed.

Q And those nurses were tending to you?

A Yes.

Q And when were your ribs and the chest fixed, if at all?

A I was there nine or ten days and the nurses fixed it up.

Q And the nurse fixed it up?

A Yes.

Q What did the nurse do to it?

A He put a lastie around my body.

Q And what was the treatment which you received for your foot—how was the foot tended while you were there—of course we don't know?

A Sometimes they fix it up good and other times they hain't.

MR. LUND: We don't intend to show any malpractice or any bad treatment or anything of the kind, but merely to show the extent of his injuries.

Q Then on July 19th what did you do?

A I was lying at "17" then—they fix up my foot—the doctor.

Q I thought you said you left the hospital and came out on the 19th of July?

A And I went in the tunnel—they fix up my foot.

Q Go ahead and tell now how you left the hospital and what you did after that?

A I go out and get a better doctors.

Q You wanted to go out?

A Yes.

Q How did you get out?

A This fellow that—

Q Who took you out?

A Johnson.

Q This young man sitting there (pointing)?

A Yes.

Q How long had you known him?

A I know him ten years.

Q He took you out?

A Yes.

Q And tell us how you got out—were you able to walk?

A No. He carry me.

Q He carried you out?

A Yes.

Q How did you travel in getting out?

A I went on my hands and knees.

Q I mean you took the—how far was it from your hospital where you were lying to Tiekill?

A Twenty-two miles.

Q And during that distance you traveled on the boat, or how was that—how did you travel between the two places?

A Johnson he helped me on one side and another fellow, and they take one step and I walk on one foot.

Q Did you travel that way during the whole distance between Tiekill and the hospital?

A No. I was in boat—I had a pass.

Q How far was it from the hospital to the boat-landing?

A A hundred feet, may be more, I don't know.

Q And then you came out to Seattle after a while, didn't you?

A Yes.

Q Do you remember the day you came to Seattle?

A It was the 30th of July.

Q And then what did you do?

A Johnson take me in the hospital here with another doctors.

Q What did he do to you?

A Examine my foot and fix it up.

Q What, if any, picture or photograph—

A Yes.

Q —was taken of your foot?

A Yes, the doctors took it.

Q And then after that where did you go?

A After I fix up my foot I was here two days and I went back home.

Q Are you a married man?

A Yes.

Q And you went home then a day or so afterwards?

A Two days after that.

Q You lived in Roslyn, British Columbia?

A Yes.

Q When you got home what did you do or what was done with you?

A There was neighbors—my neighbors telephoned the doctor right away.

Q Tell us about it.

A And the doctor come and fix it up, and the second day they come and take a piece of bone out of the side of the foot.

Q And during that time were you up walking around or what did you do?

A No, I was lying down in bed.

Q How long did you remain in bed?

A I was two months after I come home.

Q How often did the doctor come to see you?

A He was every day and then he come every second day like that, as my foot get better.

Q After the two months in bed—

A Yes.

Q —what were you able to do?

A I was not able to do nothing at that time, but after I get better I went to work.

Q What work did you do?

A I went on the machine—running the machine.

Q You ran a machine—in the mine?

A In the mine.

Q How long did you do that work?

A I run machine four days.

Q And after that what did you do?

A After that I couldn't get the shoes on my foot, it was swelled up, and the doctors said: "You have to lay off again, you can't work on the foot."

Q How long did you lay off then?

A Then I was lay off till the 2nd of January, 1911.

Q And what did you do then?

A Then I had—the mine superintendent sent a man after me—he want me to go over and see him and I went over and see him and so he says: "Can you work, Johnson?" I says: "Yes, if I get some light work. My foot is not strong for heavy work yet." He said: "Can you timber—do the carpenter work in the mines?"—I used to be a carpenter in the mines and I says: "Yes, if I get light work."

MR. GRAVES: I object to this conversation between them.

Q (By Mr. Lund) Go ahead and tell us what you did, Johnson—don't tell us what others told you or said to you?

A Then I says: "My foot is bad yet."

Q Go ahead and tell us what you did and not what you said?

A I said: "All right, if I get light work."

Q What work did you get?

A I was building chutes in the mine.

Q What work was that, light or heavy?

A That was light work.

Q How long did you do that?

A I was there nearly three months.

Q And then after that what happened?

A They put me in the heavy work—heavy timbers—I couldn't stand it.

Q What did you do then?

A I went to Washington and took a homestead.

Q You came over to Washington and took a homestead?

A Yes.

Q How long did you remain there?

A I was there nine months.

Q And what work were you able to do there?

A I was clearing a little land.

Q Have you worked wages or earned any money except what you were telling about in the mine?

A No.

Q Now, will you take your shoe and sock off and let the jury see your foot?

(Witness does so.)

A And the rock struck right there and broke the bone and this bone was split.

Q Where was it broken?

A There (showing).

Q And where is it where the bone was taken out?

A There (showing).

Q And what is the feeling in your toes now?

A These two toes are dead—I can't move them at all.

Q To what extent can you use that foot now?

A I have to be careful. It hurts right there (showing).

Q Is there any pain in it now?

A Yes; right there, mostly, the pain is, where the bone is gone.

Q Can you do heavy work at this time?

A No. I can't work in the machine any more—I can't take care of machines any more.

Q You were mistaken in the date of the month that you came to Alaska—what month was it you came to Alaska—when you went up there, Johnson,—did you go up there in May or April?

A April.

Q If you said May, you intended April?

A April when we go up there.

Q You went up in April?

A Yes.

CROSS-EXAMINATION.

Q (Mr. Graves) Where do you live now, Mr. Johnson?

A Roslyn, B. C.

Q You are living there now?

A I was in Washington—Stephens county.

Q Making a homestead in Stephens county, Washington—that is the northeast part of the state?

A Yes, close to Northport.

Q When did you come down to Stephens county?

A I went there last spring.

Q And took up a homestead?

A Yes sir.

Q You are now engaged in farming on your homestead?

A Yes.

Q When was it that you went to Roslyn from Seattle?

A It was 1910.

Q What month?

A 28th of July, or 29th of July.

Q You went up there in July?

A Yes.

Q You got down here about the 27th of July you say, or the latter part of July from Cordova?

A We left on the 25th—we left Cordova on the 25th.

Q How long did you stay in Seattle?

A I was here two days.

Q Did you have an operation on your foot while you were here?

A No, just to take pictures and I was with the doctors and he fix it up.

Q And then you went home in Roslyn?

A Yes.

Q And while you were up there at Roslyn you had a physician fix your foot, did you—a doctor?

A Yes, the doctor came up and fix my foot.

Q Is the doctor here, Mr. Johnson?

A No—he is in Roslyn, B. C.

Q Did you come to Seattle again after you went to Roslyn?

A No.

Q Were you down here at all in the fall of 1910?

A No, I have never been here since I left here.

Q Where were you when you commenced this suit?

A I was—it was at that time when I went to Roslyn.

Q You commenced it when you were at Roslyn?

A Yes. I saw this fellow here when I went.

Q You saw Mr. Lund before you went?

A Yes.

Q And you were up at Roslyn when you commenced this suit later on—now how long were you or when did you come down to Cordova from Tiekill?

A The 22nd.

Q The 22nd of July?

A Yes.

Q You left Tiekill on the 22nd of July, and came down on the railroad to Cordova, did you?

A Yes.

Q And then you took the boat at Cordova?

A On the 25th.

Q And came to Seattle?

A Yes.

Q What station was it you were working at when you were hurt?

A "123."

Q "123" above Cordova—who had charge of that station?

A Sam Rollin, he is foreman.

Q Sam Rollin is dead now, is he?

A I don't know.

Q You heard he was dead?

A I heard he die, I don't know.

Q You were not one of the stationmen working with Sam Rollin, were you?

A Eh?

Q You were not one of the stationmen working with Sam Rollin?

A No, no.

Q Sam Rollin had partners in that station work?

A Yes.

Q By station work is meant that sub-contractors take a station and do the work for the contractor, that is correct, is it?

A I suppose so.

Q How's that?

A I don't know, I guess that is the way they do it.

Q That is the way it is done?

A Yes.

Q Who hires you—Sam Rollin?

A Yes.

Q You were working by the day's work for Sam Rollin?

A Day's pay.

Q By day's pay for Sam Rollin?

A Yes.

Q Do you know who was the contractor on this work?

A Yes.

Q Who was it?

A Ed Riley and Sam Rollin and I don't know all of their names?

Q Who was building the whole road—what contractor. Do you know Heney?

A Yes.

Q Heney had the contract for the whole of the road?

A Yes, I guess he got it, I don't know sure.

Q That was your understanding, wasn't it?

A Yes.

Q And Sam Rollin and his partner had this station work and you were working for Sam Rollin?

A Yes.

Q How long had you been working for Sam Rollin?

A Two days and a half—a little over.

Q How long had you been working before that time for him—had you been working before that?

A I work at 119.

Q For whom?

A George Raily, his name is.

Q He was a sub-contractor, was he—he had station work?

A Yes, he's got station work too.

Q What work did you do for him at 119—what character of work?

A I was drilling holes.

Q You are a miner of some experience then?

A Yes, I was a miner.

Q Drilling in rock for the purpose of putting powder in it?

A Yes, but I don't handle no powder.

Q You drilled the hole and the powder was put in and exploded?

A Yes—another fellows come there.

Q That was the way you did the work at 119—and at 123—you did the same kind of work, did you?

A Yes, I was drilling there.

Q You were drilling there?

A Yes.

Q What kind of work were you doing there—tunnel work?

A Tunnel work.

Q You were driving a tunnel from the hillside?

A Yes.

Q A rock tunnel?

A A rock tunnel.

Q During what hours of the days did you work there?

A Ten hours.

Q During the daytime.

A The daytime, yes.

Q Was there any night crew?

A Yes, some fellows in the night.

Q But you were on the day crew?

A Yes.

Q Now when would you set off those charges in the tunnel—when would this powder be exploded?

A The powder was exploded on the third day I was working there—the third shift.

Q When would they shoot the powder—what times?

A They been shot most of the time at the night time.

Q At night time?

A Yes.

Q Would they shoot them any in the day time?

A Not much—a little bit sometimes—they shot them daytime too, but not at that time when I was there.

Q Did they shoot any that day that you were there?

A Only that last day when I was hurt.

Q That last day you were hurt they shot that day during the daytime?

A Yes.

Q What time of day?

A Between one and two o'clock.

Q During the morning?

A Afternoon.

Q During between one and two o'clock?

A Yes.

Q Where did you go when they shot?

A It blowed me to one side of the tunnel.

Q You would go out to the tunnel to one side? Now if this is the face back there—if this would represent the face of the tunnel (illustrating), you were driving holes into the rock face of the tunnel, were you?

A Yes, another fellow was driving hole.

Q And then this powder-man would come and put powder in there, in the holes?

A Yes.

Q And when the powder was put in the holes you would all go out to one side and they would shoot that powder?

A Yes, whenever they got ready.

Q When they got ready they would shoot?

A Yes, and go away.

Q Now did they shoot that powder—did they get ready and shoot some powder on the day you were hurt?

A. No.

Q Did they shoot any powder that day at all?

A Not at that time—not before the time of the explosion, no.

Q Had they shot any that morning at all?

A. No.

Q Had they shot any the night before?

A I don't know sure.

Q You don't know as to that?

A I don't know; I don't work in the night.

Q Was the muck there—you know what I mean—was the muck all out when you went to work in the morning?

A No, some of the muck in there yet.

Q Who took the muck out?

A Some of the car-men—some of the men.

Q Some of the muckers?

A Some of the muckers.

Q Did you go to work drilling before the muck was taken out?

A We muck a little bit ourselves to get the place started ready for drilling.

Q How many holes did you drill that day—you, yourself—in how many holes did you drill?

A We didn't drill that day—that was the last hole we were on that day.

Q You yourself, I mean?

A Me and my partner.

Q Who was your partner?

A Fred Johnson. That big man (pointing).

Q And he drilled one day?

A Yes.

Q Only one?

A Yes.

Q How many drillers were there besides you and Fred Johnson?

A I didn't look to see how many there were.

Q How many was drilling in that tunnel that day?

A I don't know. I guess there is two holes in the face, I don't know sure—I don't look there, and we were in the bench—about thirteen and fourteen feet in ahead—away.

Q Which way were you drilling, towards the north side or east?

A In the tunnel.

Q Which way was the tunnel heading, towards the north side or the east—I will ask you this way, Mr. Johnson—what part of the face of the tunnel were you drilling—on the right hand side as you faced the face or on the left hand side?

A We were on the left-hand side.

Q That is, if this table here was the face of the tunnel, you would be drilling over that way, on the left-hand side?

A Pretty near down hill.

Q Down hill?

A Yes.

Q What do you mean by down hill?

A There was twelve feet.

Q You were down hill drilling on the down hill?

A Yes, straight down.

Q You and Fred Johnson?

A Yes.

Q Who else was drilling that day at that time?

A I don't know—Ole and Carson—I know the fellows' names.

Q Carson?

A Carson.

Q Is he here?

A Yes, Carson.

Q Anybody else?

A There was three or four others, but I don't know the fellows' names.

Q Are there any of them here?

A No, not those others, only Carson.

Q Well, now, where was Carson?

A Carson hitting—heading.

Q He was ahead of you?

A He was in the heading, away farther ahead.

Q Was he to the right or way ahead of you?

A He was on the same side that I was but a little farther ahead.

Q A little farther ahead?

A Twelve or thirteen feet.

Q That is, you had blown it out up there (illustrating), you had cut out a piece from the tunnel and here there was still some down here (illustrating), and you were digging down holes to blow that out?

A Yes.

Q And he was still farther over towards the head or the face of the tunnel, drilling a hole into the face?

A Yes.

Q And he was ahead of you on the left-hand side?

A Yes.

Q And who was with him?

A I don't know, I don't remember his name.

Q Is his partner here?

A No, sir.

Q Is there anybody else here besides the two men that you named that were there that day—is there anybody else here?

A There is only the two men here.

Q Those two men you mentioned are the only ones that were there?

A Yes.

Q Now you and Fred Johnson then were down here drilling this down hole—what were you doing—were you holding the drill?

A No, I was hammering.

Q You were using the hammer?

A Yes.

Q And Fred was holding the drill?

A Yes.

Q You were hammering and he was holding the drill—were you doing that when the explosion occurred—were you hammering when the explosion occurred?

A I was hammering at that time when the explosion—

Q When the explosion occurred?

A Yes.

Q Just come down here and show me how Fred Johnson stood and what you did?

A He would sit down on an empty powder box, like this, and turn it between his two legs.

Q And you were standing, swinging the hammer?

A Yes.

Q If you were over on the left-hand side, your back was towards the rest of the tunnel, was it?

A No, my back was out of the tunnel.

Q So that you were standing and swinging this way and he stood over here and turned the drill and you were standing and swinging this way on the left-hand side?

A Yes.

Q What was Carson doing?

A They were drilling.

Q What did he do—did he hold the drill or use the hammer?

A He was holding the drill.

Q He was sitting on a box holding the drill up near the face?

A Yes.

Q Now, from where you were could you see anybody else in the tunnel, what they were doing?

A I saw Carson and his partner was drilling, and the other fellows was mucking back.

Q That was all you could see that was taking place?

A Yes.

Q You could not see anything else going on in the tunnel?

A Not at that time.

Q As I understand you, you had mucked back at the place where you could drill the hole?

A I mucked back a little in the first—in the morning.

Q They had left piles of rock all around where you were drilling?

A Yes.

Q And you and Fred Johnson got down into this hole which you had mucked out and were drilling away?

A Yes.

Q And the muckers were carrying out this loose rock that had been blown out the night before?

A Yes, they were mucking back and ahead and the cars were running out.

Q A mucker means one who takes out the loose, broken-up rock that has been blown out by the explosion?

A Yes.

Q Now, at the time that this explosion occurred—besides those drillers and muckers—could you see—besides Carson and his partner—could you see other drills at work?

A No. I saw them after dinner, but they weren't drilling after dinner, they were mucking back.

Q Was there an explosion—did they shoot off any loads at dinner time?

A No.

Q. They didn't drill after dinner—just you four were all that were drilling after dinner?

A Yes, and the others were mucking back.

Q Whereabouts were those holes which you say that Riley—

A About twelve feet on the right-hand side—twelve or thirteen feet from me.

Q Riley?

A Ed Riley.

Q Anybody else with him?

A His partner.

Q Who was his partner?

A I don't remember his partner's name. Rex or something like that. I don't remember his name.

Q Whereabouts was he at work?

A He was loading a hole in twelve or thirteen feet on the other side down.

Q He was over on the other side of the tunnel, on the right-hand side, twelve or thirteen feet from you?

A Yes.

Q Did you go over there where he was?

A No.

Q Did your partner go over there where he was?

A No.

Q What time did Riley come there?

A Right after one o'clock.

Q It was after one o'clock?

A Yes.

Q What did he have?

A I was looking behind my back—I heard some one coming and I saw Riley come with a loading stick in his hand and the box of powder in his arm.

Q The powder and the loading stick in his hand?

A Yes.

Q Who had drilled the hole over there where he went to work?

A This fellow that was ahead—Carson and the other fellows.

Q When had they drilled it?

A They drilled that hole before that day.

Q Before that day?

A Yes.

Q Hadn't that hole been exploded the night before?

A Yes—that is what I don't know—I didn't see them—but they say that it didn't break.

Q That is, this particular hole, Johnson, had been loaded and the fuse lighted but it didn't break out?

A No, sir.

Q That is, the powder in there didn't blow out—is it not a fact that Riley was trying to take out the powder out of that hole that hadn't blown out?

A I don't know.

Q He may have been, so far as you know, trying to remove the powder out of that hole that didn't blow out?

A I don't know. I didn't see him. I don't know. I seen him loading—I saw him putting more powder in.

Q You don't know what he was doing?

A I saw him putting powder in the holes.

Q When?

A After dinner. After we came back after dinner—a little after one o'clock.

Q As I understand you, you heard him coming in first?

A Yes.

Q Then you looked over your shoulder and saw him carrying a stick and some powder?

A Yes.

Q And that was the last you saw of him?

A No; I saw him he was putting powder in.

Q You saw him putting powder in?

A Putting powder in and loading the hole.

Q How long before the explosion?

A I don't know exactly how long but it was only a little while. I was hammering—I didn't stop working.

Q You didn't stop work at all?

A No. I just saw him, that was all, a little ways off.

Q The fact is you saw him go over to that hole, and that was his post, and you paid no more attention to it?

A That's right—that's right—and it was none of my business at all.

Q All you knew is that you saw him with the powder and

loading stick, going over to the hole, and that is all you know about it, isn't that about correct?

A Yes, I was drilling—I was doing my work.

Q You paid no attention to what he was doing?

A I saw him just what he do.

Q You know that this hole which he went to didn't break out the night before, did it?

A Yes. That is what they say. I don't know. I heard that but I don't know sure. I didn't see him blast it the night before.

Q You know that the hole, whatever it was, had been bored and drilled on the day before, hadn't it?

A I don't know sure because I didn't see him.

Q You hadn't gone over there at all?

A No, only in the day time.

Q You had during the day?

A Yes.

Q Had Fred Johnson gone over?

A No.

Q Had Carson gone over?

A No, they were day time.

Q They were, like you, attending to their business, drilling holes?

A Yes, in the day time.

Q When this explosion occurred what direction was your back, towards the hole where Riley was at work—how was your back with reference to Riley?

A That hole?

Q Yes.

A I was sideways, like that (showing), maybe two or three feet further back. That hole was like that (showing).

Q Did he have any dynamite caps with him?

A I don't know. I don't see him—I not so close, and that is all I see him, he was putting powder in.

Q Did you see what powder it was that exploded, whether it was in the box or in the hole?

A That powder was in the box.

Q The powder that exploded was in the box?

A No, the powder was—the box he put in the hole.

Q Do you know what exploded—where the powder was that exploded?

A No.

Q You don't know whether it was in the hole or in the box?

A No, it was in the hole.

Q It was in the hole?

A Yes.

Q How do you know?

A Because the rocks come on the top of me.

Q The rocks came on the top of you?

Q But there was loose rock all around you?

A Yes, but the hole was spread.

Q Then your idea is that Riley when he was loading this powder in the hole set it off some way?

A No, the powder was in the box after the explosion.

Q How's that?

A The powder was in the muck—was in the box—the box was mashed to pieces, but the powder was in the muck.

Q Did you see the box after the explosion?

A Yes, no, I don't see no box.

Q Did you see where the explosion took place after you were hurt—did you go there and examine for the explosion?

A No, sir; I went on my hands and knees to see this partner of mine.

Q You went on your hands and knees to where your partner was?

A And over his foot.

Q What I mean is that you didn't go over there—you don't know whether the powder that Riley had in the box—whether that exploded?

A No, not in the box.

Q You don't think that it did?

A No. The hole was break.

Q. The hole was broke?

A Yes.

Q That is, the hole in the face of the tunnel was broke out?

A There was a little ways from the face, about seven or eight feet from the face—that hole that he was loading—that was went off.

Q That one went off?

A Yes.

Q I would like to understand you. You were drilling here on the down hole?

A Yes.

Q There was a hole over there which you say did not break out?

A The night before.

Q Was that a down hole or a side hole?

A A side hole.

Q A side hole in the face of the cliff?

A That was not in the face. That was right in the bottom, that hole like this.

Q It went in that way in the bottom?

A Yes.

Q Instead of going down, it went sideways into the bottom part and that hadn't been taken off?

A Yes.

Q How high was the bottom that hadn't been blown off?

A Six or seven feet.

Q That is, in going through that tunnel they would blow out the upper part and then they would come along and blow out the bottom part?

A When the bottom got too high then they put, about twelve feet, holes in the bottom and blow the bottom lift.

Q So as to make the bottom of the tunnel level?

A Yes.

Q You were drilling a down hole on the bottom and Riley, about twelve feet over there, was drilling?

A He don't drill.

Q Well, was loading a side hole in the bottom?

A Yes.

Q That was the hole that didn't break out the day before?

A Yes. I don't know for sure.

Q That is what you understand?

A Yes, I understood it. I am not sure what hole it was.

Q Now, then, where the explosion occurred, was in that side hole; is that right?

A Yes, that side hole—the lifter.

Q What is called a lifter, or side hole—it is called a lifter because it lifts up the top?

A Yes.

Q That is where the explosion occurred, was in that lifter?

A Yes.

Q And it was in that lifter that you understood, the powder didn't break out the night before?

A Yes.

Q Did you see that lifter go off, or explode?

A No.

Q Your back was towards him?

A No, I was just sideways.

Q Well, he was on the level?

A He was on the same level I was, only a little higher, about six or seven feet higher.

Q But you were standing back and sideways to him this way (showing), drilling, and he was over there, wasn't he?

A No, he was like this (showing). It was about three feet higher than that.

Q This table is about twelve feet long—now come down here—you were over there on the left side—we will say this was the box on which Fred Johnson was sitting holding the drill, and that would be the drill (illustrating), now where were you standing when you were drilling?

A I was standing like that, and my partner was there (showing).

Q And you were hammering with the drill right there?

A Yes.

Q And as I stand here at the table, this would be the side hole where he was working?

A Right there by that corner he was loading the hole.

Q And where was Riley?

A I don't know.

Q You don't know who was with him—was Riley killed by the explosion?

A No, there was nobody killed. Riley was hurt though.

Q You don't know where he is?

A I don't know.

Q If there was any powder in this lifter hole, as you call it, it would have been in there over night—hadn't it?

A I don't know anything about it.

Q It must have been in there over night?

A I don't know.

Q There had been nobody in there loading it during that day?

A There was Riley was loading right after dinner.

Q In the forenoon he was not?

A No—nobody in the forenoon.

Q No one?

A No one touched the hole.

Q Did you work over there towards that hole during the forenoon?

A No sir.

Q Did anybody drill over there towards that hole in the forenoon.

A No sir.

Q Did anybody muck away from in front of the hole?

A Only on the left-hand side a little farther ahead they were mucking back.

Q Nobody working over on the lifter side during the forenoon at all?

A No sir.

Q They left that alone, didn't they?

A Yes.

Q Well now, Johnson, is it not a fact that the reason you did not work over there and the reason the muckers didn't work over there was because—

A (interrupting) The muckers worked right between me and that hole—the missed hole.

Q And that missed hole?

A I don't know what hole it is.

Q Is it not a fact that the reason you did not work over there on that side and nobody worked on that side was because it was known that there was powder in that missed hole?

A Excuse me, there was a hole was being blast—I don't know.

Q You knew that there was a hole over there, didn't you?

A Yes, I saw there was a hole there.

Q And you knew that it had been missed, too, didn't you?

A I didn't know whether it was missed—I was mistaken there—I didn't know whether it was missed, but they been blasting that hole before—I don't know why—I just called them holes that were missed that didn't break—that any miners call it in the mine like that, you know, that is we call it, if there was a hole being blast and it don't break, they called that a missed hole.

Q If there was a hole there and it hadn't broken out you would call it a missed hole?

A Yes.

Q But there was nobody working over there near that missed hole?

A Yes, they being mucking and drilling ahead and back of the hole.

Q That is, they were not drilling on the down hole but they were drilling up on the face of the tunnel on the upper part—this missed hole was on the down part of the tunnel, wasn't it—it was on the bottom?

A No, that hole he was loading was on the side.

Q But it was on the bottom part of the tunnel?

A Yes, the bottom part.

Q And where they were drilling on that side of the tunnel is not on the bottom part but at the upper part, that morning?

A This was drilling right in the heading.

Q How did you happen to hear about that hole not breaking out?

A I heard after it went off—after I was in the hospital, but I don't know sure if they being blasting or what they were doing.

Q You heard that in the hospital?

A Yes, but I don't know anything about it.

Q Didn't you hear it in the tunnel that morning?

A No, nobody say nothing about the hole at all, only at the time I seen it was loading when they put powder in.

Q Be sure now that I don't misunderstand you. This

lifter hole in the side, where Riley went, was drilled on the day before the explosion, wasn't it?

A Yes, the same day when we started to work.

Q How long had you been drilling in this particular hole before the explosion occurred on that day?

A I was drilling all the morning.

Q How deep was the hole when the explosion occurred?

A That hole was drilled about eleven feet.

Q Had you drilled that entire distance of eleven feet that day?

A Yes.

Q In other words, the rock through which you were drilling was of such hardness that it took half a day and over to drill eleven feet?

A Yes, that's right.

Q How long was it after Riley and his partner came into the tunnel before the explosion occurred—how much time was there between his coming and the explosion?

A I could not tell exactly the time—I didn't look at any time, but it can't be more than fifteen or twenty minutes.

Q About fifteen or twenty minutes?

A Yes.

Q During that fifteen or twenty minutes were you drilling all the while?

A Yes.

Q So that this may get into the record, I wish to go over it again. In drilling, your partner or your assistant, Fred Johnson, held the steel drill in his hand?

A Yes.

Q And twisted it in his hands as you struck it with the hammer, is that correct?

A Yes.

Q Carson and his partner were drilling in the same way?

A No. They were drilling—heading like this.

Q Instead of down, they were drilling straight into the heading?

A Yes.

Q But they were working in this way, too?

A Yes.

Q With the drill?

A Yes.

Q Carson was using the hammer, was he?

A No, his partner was using the hammer.

Q And he was holding the drill?

A Yes.

Q Now in doing your work, Mr. Johnson, in working with that drill you have to keep your eyes on the drill, don't you?

A Yes.

Q And the man who is operating the drill watches the drill to see that he keeps it in the right position, doesn't he?

A Yes, because they have to hold them steady.

Q Each one of you is bound to give his attention to that particular work in order to avoid an accident?

A A man that is used to the hammer don't keep his eyes on it all the time—you have a chance to look around.

Q You have a chance sometimes to look around?

A Yes.

Q When you saw Riley come in what did he have under his arm?

A Powder and a loading stick.

Q What was the powder in?

A In a box.

Q Was the box covered?

A No.

Q What kind of powder was it?

A I didn't see it. I didn't look what kind of powder he has got.

Q Did you see any powder?

A I see the powder in there but I didn't—

Q What was it wrapped in?

A In paper, like powder, you know what kind powder is.

Q How near was Riley to you?

A He was ten feet—ten or eleven feet.

Q Ten or twelve feet?

A Yes. When I looked he was behind my back.

Q What did he do, the first thing when he came in?

A When he came in with the powder he was loading the hole.

Q When he first came in there that afternoon?

A He started to load the hole.

Q What did he do?

A He put powder in the hole.

Q What powder did he put in?

A That powder he was carrying.

Q Did you see the powder in his hands?

A No, I didn't see it in Riley's hands, but I saw it in his partner's hands.

Q You saw it in his partner's hands?

A Yes.

Q Did you see him put it in the hole?

A Yes.

Q Did you see them ram it with anything?

A I don't understand.

Q Did you see them push it with anything?

A Yes sir, with the loading stick.

Q They pushed it with the loading stick?

A Yes.

Q You saw that, did you?

A Yes, I saw that Riley was pushing it in.

Q You saw Riley pushing it in?

A Yes.

Q How long was that before the explosion?

A Three or four minutes.

Q Three or four minutes?

A Yes.

Q Did you see him doing anything during that three or four minutes before the explosion, anything else?

A No.

Q So that the last thing that you saw was Riley pushing some powder in this hole three or four minutes before the explosion, is that correct?

A Yes—push the powder—at that time I was looking he was loading.

Q You were looking at them, and three or four minutes before the explosion you saw him push it in with a loading stick?

A Yes.

Q With the loading rod?

A Loading stick, yes.

Q And after that you didn't see anything more that occurred?

A No.

Q Did you yourself see what caused the explosion?

A No, I didn't.

Q Do you know whether that explosion occurred in the hole or occurred in the box of powder that was sitting beside Johnson and Riley?

A No. I saw after I was on hands and knees and the explosion, the powder was in the muck—some powder was in the muck.

Q You saw some powder in the muck?

A Yes.

Q You are sure that the powder in the box did not explode?

A No.

Q It was the powder in the hole that exploded?

A Yes.

Q Then the jar and the throwing of this rock around there did not explode the powder in the loose rock, did it?

A No—in the hole—it break that hole.

Q But you say that lying in the muck you saw powder that was not exploded, didn't you?

A Yes, some powder left.

Q That is, there was not any powder, till Riley came in, in that muck?

A No.

Q So that the powder which you saw in the muck was powder that was in the box that Riley brought in there?

A Yes.

Q And that powder did not explode?

A Not in the muck.

Q What caused it to go over there—what threw it over into the muck, do you know—was it the explosion?

A Yes, the explosion.

Q The explosion in the face of the tunnel threw this powder in the box over in the muck, did it?

A Yes, and it break that box.

Q But it didn't explode that powder in the muck?

A No.

Q So that the explosion that occurred there, occurred in this lifter hole where Riley was working—Riley was loading this lifter hole, wasn't he?

A Yes.

Q And the explosion occurred in the powder in that hole?

A Yes, the explosion was in the hole.

Q And it occurred while Riley was working at that hole. When you got to Cordova going up there, you say you got a pass at the steamship wharf?

A Yes.

Q You went up to Cordova on the Alaska Steamship Company's ship, did you?

A Yes.

Q You know that the man that you went to at the wharf was M. J. Heney's agent, don't you?

A No, I don't.

Q You don't know who he was, do you?

A It was not Heney's.

Q You don't know?

A It was not Heney's.

Q It was at the office on the wharf?

A No, it was The Katalla Company's office there.

Q At The Katalla Company?

A Yes.

Q It was not on the wharf?

A Yes, it was on the wharf.

Q After this accident and after you came down to Cordova you released Heney—

MR. LUND: I object to that as being improper cross-examination. I did not inquire as to any release. It is not part of my case in chief. The release is pleaded in the answer and denied in the reply, and I think it is part of the defense, and I object to it as improper cross-examination.

MR. GRAVES: It is upon another point. I do not mean this for the purpose of showing the release at the present time, and I would like to complete my question.

Q You did sign a paper for M. J. Heney, the contractor,

at Cordova, didn't you, on the 22d day of July, just before you came out?

A Yes.

Q I will show you this paper and I will ask you if that is your signature? (showing).

A That is my name.

Q You wrote that, didn't you?

A Yes.

Q You signed that at Cordova?

A Yes I signed that, that is my name.

(Document identified by witness is marked "Defendant's Identification No. 1.")

Q (Mr. Lund) At the time you came there on the job, Mr. Johnson, at section 123, and from the time you commenced to work until the day of the explosion, what did you have to do with or did you handle any dynamite there?

A No.

Q Did you see the dynamite?

A No.

Q Did you at any time know there was any defect in it?

A I didn't know—I didn't see the dynamite, only that day I seen the box that Riley carried in.

MR. GRAVES: I object to that—to the form of the question—to the assumption contained in the question that there is any allegation here that he did know of any defect in it, or any proof that there was any defect in it. It is a mere assumption.

THE COURT: I take it that that objection relates to the order of proof. I suppose counsel for plaintiff intends to offer some evidence showing defective dynamite. I will overrule the objection.

(Exception noted for defendant.)

A I didn't know—I didn't see the dynamite, only that day I seen the box that Riley carried in.

THE COURT: You used the word "dynamite," and counsel for defendant used the word "powder." I would like to know whether there is any difference in the meaning of the two terms employed here.

MR. LUND: I mean dynamite that comes in sticks, ordi-

narily called dynamite. I suppose Mr. Graves means the same thing.

MR. GRAVES: I used the word in the generic sense of explosive and not to distinguish between black powder and dynamite.

Q You say you didn't know there was anything wrong with the powder at that time?

A No.

Q When we speak of powder we mean dynamite sticks?

A Yes, dynamite sticks, and that I saw there in Riley's box.

Q You saw the sticks in Riley's box as he carried them in?

A Yes.

Q What kind of sticks was it?

A It was about eight or nine inches long and about three-quarters of an inch or an inch through.

Q About an inch in thickness?

A Yes.

Q They were round?

A Round.

Q When you speak of muck, what do you mean by that—in the mine?

A Dirt—rock.

Q You mean—

A Loose rocks.

Q You mean loose rocks that is blasted out of the tunnel?

A Yes, that have been blasted a couple of days ago.

Q When you commenced to get your hole ready in the morning you clear it away—the muck around there—the loose rocks?

A Yes sir, the first thing.

Q How large a depression was it you started to drill in?

A About twelve feet.

Q I mean from the surroundings—how much below were you on the level from the hole that Riley was loading there?

A Riley was a little higher up, about six or seven feet higher up.

Q You say that he brought a loading stick with him?

A Yes.

Q And that he was using the loading stick to push the powder in with?

A Yes.

Q What was the loading stick made of?

A Wood.

Q You spoke of having heard in the hospital that that hole that they were loading had been blown out—what did you mean by that?

A That was being blasted the night before last.

Q It was being blasted out?

A Yes.

Q And what happened to it?

A It don't break.

Q Was the dynamite still in there or how was that?

A I don't know. I don't see him, but he said the hole went off, but it don't break and they had to blast it over again.

Q (By Mr. Graves) You heard that the dynamite hadn't burst out this hole when it was exploded the night before—you say that is what you heard in the hospital?

A Yes, that is what I heard.

Q Whether or not the dynamite was in that hole had been exploded, you do not know, do you yourself?

A No, I don't know, but I heard it don't break.

SAMUEL MURCHISON testified as follows:

“Q (By Mr. Lund) You reside in the city?

A Yes.

Q In 1910 what work were you engaged in?

A On the construction of the Copper River & Northwestern Railroad.

Q What position did you hold?

A I was superintendent for the contractor.

Q Who was the contractor?

A M. J. Heney.

Q Who was the contractees—the one that let the contract to Heney—from whom did Heney have a contract?

A From The Katalla Company, I believe.

Q Who supplied the explosives that were used on the construction of the road?

A So far as I know, The Katalla Company.

Q And do you know where Section 123 was?

A Mile 123.

Q Where was that?

A It was on the line of the road, 123 miles from Cordova.

Q What was the nature of the construction work going on there?

A Rock work and tunnel work.

Q In May, 1910, what was the nature of the work going on there?

A General construction work.

Q Rock and tunnel work?

A Yes.

Q In that tunnel work and rock work was explosives used?

A Yes sir, they had to be.

Q And who had supplied those explosives?

A How do you mean now?

Q I mean who supplied the explosives that were used there at that time?

A They were the explosives—oh, the explosives were all gotten from The Katalla Company as far as I know.

CROSS-EXAMINATION.

Q (By Mr. Graves) You say you were superintendent for M. J. Heney?

A Yes.

Q Were you in Alaska at that time?

A Yes, I was.

Q And M. J. Heney was the man who was contracting and building the road?

A As far as I understood, yes.

Q As far as you understood?

A Yes.

Q And Heney purchased his powder from The Katalla Company?

A Well, not exactly.

Q How's that?

A I don't understand it just that way. They were to have furnished all the powder for the construction.

Q All that you know about it is that Heney furnished the powder to those sectionmen, didn't he?

A That is through The Katalla Company.

Q But it was Heney's work to furnish those men with powder, wasn't it?

A It was after the second agreement, I believe, with The Katalla Company.

Q After the second agreement Heney furnished the powder to the stationmen?

A Yes.

Q And that was true in the spring of 1910?

A Yes, that is on station work.

MR. GRAVES: That is all.

RE-DIRECT EXAMINATION.

Q (By Mr. Lund) Who furnished the powder that was used by these men at the time?

A Well, it was furnished through Heney from The Katalla Company.

Q It was furnished through Heney from The Katalla Company?

A Yes.

Q Under what arrangement between them, so far as you know?

A There was a selling price set by The Katalla Company.

Q If the contract should appear to provide otherwise, then you are mistaken as to that arrangement, are you not?

A I don't understand you.

Q I beg pardon.

A I didn't quite get that question.

Q What do you know about it yourself, personally?

A Nothing, excepting as we carried along with the work and the supply of powder from time to time.

Q Do you know personally under what arrangement the powder was furnished to those stationmen?

A They were to pay a certain price for the powder that they were using.

Q Where did the powder come from?

THE COURT: I think he answered that several times.

A We received it from The Katalla Company.

Q I want to know what the arrangement was between Mr. Heney and The Katalla Company as to that powder?

MR. GRAVES: I object to that on the ground that it appears there was a contract between the parties and that is the best evidence.

THE COURT: It appears that there was a contract, and the contract will be the best evidence.

Q (By Mr. Graves) Without reference to what the contract was, The Katalla Company had certain material in Alaska, didn't it?

A Yes.

Q Heney was the contractor?

A Yes.

Q And this work was let to the stationmen along at different places?

A Yes.

Q And Heney had a contract of some kind with The Katalla Company and then he had a contract with each one of those stationmen for the work?

A Yes.

MR. LUND: I want to ask one more question:

Q What, if any, knowledge did you have as to any defect in the dynamite as it was furnished to men upon that particular station?

A I didn't know whether—I didn't have any knowledge that there were any."

HERBERT CARSON testified as follows:

Q (By Mr. Lund) You live where?

A In Roslyn, British Columbia.

Q How long have you lived there?

A Fifteen years.

Q And what is your occupation?

A I am a miner.

Q And how long have you followed the occupation of miner?

A Fifteen years.

Q Where were you working in May, 1910?

A I was working in different places. I started to work in Camp "119" on the Copper River Railroad.

Q Your experience in mining has been in quartz and coal mines?

A In quartz mines.

Q And what experience have you had in handling dynamite?

A Considerable.

Q To what extent?

A Well, I used it ever since I started mining.

Q Used it more or less since you have been mining?

A Yes.

Q Do you know Mr. Johnson, the plaintiff in this action?

A Yes.

Q Tell the Court and Jury whether you and he went up to Alaska together?

A We certainly did.

Q You came from Roslyn to Seattle?

A Yes.

Q And you heard me offer here to ascertain from him how he came to go to Alaska and what, if any, understanding you had here in Seattle with any one in regard to employment up there—can you tell us what that was?

A Well, we came to Seattle in answer to a letter that we had from—with regard to an advertisement in the newspaper, wanting rock-men to work on the Copper River & Northwestern Railway.

Q Who did you see in Seattle in reference to that?

A I saw Mr. Heney's agent on the wharf.

Q And then what arrangement did you make, if any, with him?

A We made an arrangement with him and secured our tickets through him?

Q Through him?

A Yes.

Q What arrangement did you make through him?

A We made an arrangement with him to go to Cordova and be shipped on from there.

Q Where to?

A To the construction work on the Copper River Railway.

Q And for what purpose?

A For the purpose of working on the railroad.

Q And when you came to Cordova what took place with reference to your employment?

A Well, we came down to see the agents on the wharf in Cordova and he gave us a pass and a meal ticket to get our dinner at Camp "49".

Q And where is Camp "49"?

A It is forty-nine miles out of Cordova.

Q On the—

Q On the Copper River & Northwestern.

Q On the Copper River & Northwestern Railroad?

A Yes.

Q And from there you went on, where to?

A From there we walked across the river and waited until the train got ready to go to Tiekill.

Q What, if anything, did you assist in doing when you were there?

A We assisted them to load some ferries with powder and some coal sacks were lying there and stuff like that.

Q When you speak of powder, what sort of powder do you mean?

A Well, dynamite in cases.

Q Where was that dynamite being sent to?

A It was sitting up on a sand bank.

Q I mean where was it going to?

A It was supposed—

MR. GRAVES: I shall object to that, as being a month or six weeks before the explosion.

(Question withdrawn.)

Q (Mr. Lund) After that, where did you go to?

A Tiekill.

Q How far is that from Cordova?

A One hundred and one miles.

Q Is it on the line of the Copper & Northwestern?

A Yes.

Q. And when you came to Tiekill what arrangement was made?

A Well, we stayed there in camp a couple of days and made arrangements with Mr. Murchison to go out and work for George Raildy at Camp "119."

Q When you speak "we," who was we?

A There was ten of us together—a party made up in Roslyn to go there.

Q In Roslyn?

A Yes.

Q Was the plaintiff one of them?

A Yes.

Q He was with you there at Tiekill?

A Yes.

Q Did he go with you at Camp "119"?

A Yes.

Q How long did you remain there?

A We remained there till the morning of the 23d of May.

Q And what work were you there put to?

A We were shoveling and drilling.

Q And then after that where did you go to?

A To Camp "123".

Q Who went with you?

A Mr. John P. Johnson and Mr. Fred Johnson.

Q And the three of you went there to Camp "123"?

A Yes.

Q What was the date of that?

A May 23d.

Q And what did you find the condition to be over at Camp "123"?

A Well, we considered the accommodations a little better.

Q I mean what work were they doing there?

A They were driving a tunnel at one end and squaring up the tunnel at the other end.

Q Where did you and Mr. Johnson go to work?

A We went to work in the north end of the tunnel in Mine 123.

Q Doing what kind of work?

A Drilling.

Q And how many days did you work there up to the time of this explosion that is mentioned here?

A Two days and a half—a little over two days and a half.

Q Where were you at the time the explosion took place?

A I was working in the heading on the right-hand side—on the left side going in.

Q In the tunnel?

A Yes.

Q Who was working there with you?

A A man named Bird—I don't know his other name. He was a stranger to me.

Q How far from the hole that was being loaded?

A I should judge it would be about twelve or fourteen feet, not farther.

Q And were you using the hammer or turning the drill?

A I was turning the drill.

Q Sitting down?

A. Yes.

Q. And now tell us—tell the jury what you saw of that explosion and how it took place and all about it?

A When we went to work in the tunnel Mr. Riley said he had a hole he had to blast before he could drill his lifter. He was working in the heading with us and we had started to drill our lifter on the left-hand side and we were working at one, and Mr. Riley came in with his partner and the powder and the tamping stick to load this hole.

Q. Go ahead.

A And I saw him start to load the hole and was watching him, because we all had to go when he had it prepared to blast.

Q I don't hear you?

A I saw him start to load the hole and was watching him

while he was loading it, because we all had to go out when he was prepared to blast it.

Q Tell us how he loaded it?

A He used his tamping stick and his partner stood there and took the powder and split them—split the sticks and handed it to Mr. Riley, and he took his tamping stick and shoved them in the hole.

Q What was that tamping stick made of?

A Made of wood.

Q What is the ordinary and proper method of loading dynamite into a hole?

A I never used any other system than that.

Q And then what happened?

A Well, I can't altogether recollect what happened. I got knocked out. The explosion took place and buried me and buried two other fellows and I got in a little cavity in the wall. After that I don't really know what did happen for some little time.

Q You were laid up for how long?

A I was laid up for very near a month.

Q Let me ask you now—before this accident or explosion happened, what, if any, occasion had you to use the powder?

A Well, I had occasion to use the powder in springing holes.

Q And where was the powder kept up there?

A The powder was kept in a log building.

Q And tell us what you found to be the appearance of that powder that was used there?

A Well, the powder—well it was ordinary powder, it appeared to be—it appeared to be wet.

Q Tell us what it looked like?

A It was the ordinary hand-sealed powder.

Q By powder you mean dynamite?

A Yes, giant powder.

Q Is giant powder and dynamite the same thing?

A Yes.

Q Go ahead.

A It looked to be bleached like, in the paper, to my mind.

Q Was there any stamps or marks or dates on it?

A On the boxes, yes—very few on the powder.

Q What was the date on the powder?

A The date on the cases was May, 1907.

Q May?

A May, 1907.

Q And this was in May, 1910,

A Yes.

Q —that you were using it?

A Yes.

Q Now tell us what was the appearance of the sticks—what did they look like?

MR. GRAVES: I shall object to this because it is not shown that this is the powder that was used on this particular day—he is speaking of powder that he saw at some other time.

THE COURT: I think there should be some connection shown between the powder used on the occasion in question and the other; at least sufficient evidence to show by an inference that it was the same class of powder.

MR. LUND: I intend to connect it up, if not by this witness by other witnesses here present, to show that it was the same powder.

THE COURT: I don't know where this powder was that this witness testified about—where he saw it or the circumstances about it.

Q (Mr. Lund) Where was the powder when you saw it, Mr. Carson?

A I saw the powder in the powder-house.

Q Was there more than one kind of dynamite—

MR. GRAVES: (Interrupting) At camp "123" or "119"?

A "123."

Q Was there more than one kind of dynamite in the powder-house?

A As to that I can't say.

Q How many kinds did you see there?

A I only saw the one kind—the kind we were using.

Q Had there been any other kind in there, would you have seen it?

(Objected to by counsel for defendant. Objection overruled. Exception noted for defendant.)

A Yes, I believe I should.

Q How long was that before the explosion took place?

A Well, it was not very long.

Q How long?

A Well, I was only working there two days and a half before the explosion took place.

Q I will ask you now to state what was the appearance of the dynamite which you saw in the powder magazine?

A Well, some of this powder appeared to be bleached, and in places where I saw the sticks broken it looked discolored.

Q And what, as to dryness or moisture?

A Well, it appeared to be moist—very moist, some of it on the outside.

Q Outside of the wrapper?

A Yes.

Q What was the nature of that moisture, as to whether it was watery moisture or oily moisture?

A It appeared to be an oily substance.

CROSS-EXAMINATION.

Q (Mr. Graves) What river was this along which you were doing this work; what was the name of the river along which the work was carried on?

A The Copper River.

Q The Copper River was not opened yet to navigation for boats that spring while you were up there, was it, up to the time of the accident?

A No sir.

Q Where was the Katalla Company's warehouse with reference to camp 123?

A The warehouse was at 122.

Q Supplies had to be carried in by sled, didn't they, up to those camps?

A Yes, sir. They were freighted in over the ice on sleds.

Q Who did the freighting?

A Well, I always understood it was the Katalla Company that was doing the freighting.

Q I asked you whether you know who did it—did Heney's men and the stationmen go down and get their supplies and bring them up there?

A No, all the supplies were delivered to 122.

Q This powder which you saw—in whose powder shed was that?

A The powder was in the—at what time?

Q Well, Sam Rollin—did he have a shed where he had his supplies?

A Yes, he had a shed.

Q This powder which you spoke of was in Sam Rollin's shed?

A Yes.

Q And how long Sam Rollin had it there, you don't know?

A Not positively, no.

Q You don't know when Sam Rollin carried it in there?

A Well, I am not positive.

Q You don't know?

A No sir.

Q You had only been there two days and a half?

A I had only been there two days and a half.

Q Sam Rollin had it in there before you came in?

A Yes.

Q Where it got the water in it, whether it laid out in the sun and got bleached, you don't know?

A No.

Q You don't know whether it was bleached after it came into the possession of Sam Rollin or not, do you?

A Well, it could not very well get bleached there.

Q Well, you don't know anything about it, do you?

A It was—

Q You don't know anything about it?

A No, only what I saw there.

Q And that is all you know, what you saw there—what did you see the figures "May, 1907," on—what was that on?

A On the ends of the powder cases.

Q On the ends of the powder cases—the powder box?

A Yes.

Q How many boxes did you see that on?

A Well, several.

Q How many?

A I could not positively say.

Q How many powder boxes were there in there?

A There must have been a couple of hundred.

Q And you may have seen it on several—now you say you used some of this powder to spring holes with, did you?

A Yes.

Q Did you use the powder marked "May 1, 1907"?

A There was no discrimination used.

Q Did you take it out one of those cases marked that way?

A Yes.

Q Were those cases sealed when you took it out?

A They were cased up—they were boxed up, yes.

Q Were the cases or boxes sealed—did you open the boxes yourself?

A Yes.

Q And you took some out that was marked "1907"?

A Yes.

Q And that was the powder which you used?

A Yes.

Q And that was how you came to see it was marked "1907"?

A That was common curiosity lead me to look at it.

Q You noticed it was on that piece that you used—it was marked "1907"?

A Yes.

Q You have had experience in the use of powder?

A Yes.

Q And you used this to spring those holes?

A Yes.

Q What do you mean by springing a hole?

A Well, those holes were drilled very small, and to get action with the powder it was necessary to spring them, to make a chamber at the bottom of the hole to get the proper force to break the ground.

Q How did you get the powder down into the hole?

A Tamping stick.

Q You used a tamping stick?

A Yes.

Q This powder marked 1907, you took and pushed it down with a wooden tamping stick into the holes?

A Yes.

Q How big were those holes—how deep?

A From five to seven feet.

Q How was this powder exploded after it was down in the holes?

A By a fuse and cap.

Q Who lighted the fuse?

A The man springing the holes.

Q Who sprung the holes?

A I did on different occasions.

Q On different occasions?

A Yes.

Q Prior to this accident?

A Well, I could not say.

Q Just answer my question—prior to this accident—before the accident?

A I am positive I done it once or twice before the accident.

Q At Sam Rollin's camp?

A Yes sir.

Q You had been there two days and a half?

A Yes.

Q When were there any shots fired in the face of this tunnel before the day of the accident?

A It had been blasted the night before.

Q The night before?

A Yes.

Q This hole that missed fire, that didn't break out—when was that fired—the night before or the night before that?

A I could not say when it was fired myself.

Q You don't know as to that?

A It hadn't been fired during that day.

Q There had been some shots fired the night before the accident though?

A Yes.

Q And when do you spring the holes—after they are fully drilled?

A Yes.

Q In other words, after you have drilled the holes to the depth you want, you put dynamite in the bottom, a small amount, and spring it, force it, so that that hole will hold enough charge to blow off the face of the cliff?

A Yes.

Q That is it?

A Yes.

Q What day did you commence work?

A I commenced work on the 24th of May.

Q What were you doing that day?

A Drilling.

Q Who drilled with you?

A Sam Rollin drilled part of the time with me.

Q How many holes did you drill that day?

A I drilled two holes, I think.

Q Did you spring the holes that day?

A Well, the usual custom was to spring the holes—

Q I didn't ask you for the usual custom—do you recollect whether you sprung any holes that day?

A Well, I can't remember exactly.

Q Did you spring any holes the second day?

A Yes.

Q Did you spring any holes the third day?

A No sir.

Q How many holes did you spring the second day?

A Sprung three.

Q You sprung three?

A Yes.

Q Where did you get the powder.

A I got the powder along the grade.

Q Did Johnson spring any holes?

A Johnson was drilling down-holes.

Q When you were springing the holes did the men go out of the tunnel?

A Yes.

Q How many trips did you make to the powder house on the second day?

A I only went there twice.

Q Why did you go there twice?

A To get powder.

Q To get powder twice?

A Yes.

Q Who sent you there?

A Mr. Rollin.

Q Did he go there with you?

A No sir.

Q Did the powder men assist you in springing those holes?

A There was no powder men there.

Q I thought Riley was engaged in that business—I understood Mr. Johnson to say that Riley was the man who handled the powder.

A That blasting is all done on the night shift—that is the final blasting is done on the night shift.

Q Did you do any blasting at night?

A No sir.

Q Then you went up there twice—how much dynamite did you get either time?

A Well, the first time we only required one or two sticks.

Q Was there anybody in charge of the powder house?

A No sir.

Q You just went in there and went to the boxes and took out two sticks, now is that correct?

A Yes.

Q Then what time of day was that?

A Well, that would be about ten o'clock in the morning.

Q What time did you come back there again?

A About two o'clock.

Q How many sticks did you get that time?

A As near as I can recollect, about five or six.

Q Did you get them out of the same case?

A I couldn't say for certain.

Q How many sticks of dynamite are there in a case?

A As near as I can judge, about one hundred and eighty.

Q One hundred and eighty?

A Yes.

Q Did you open a case the first time you got the two sticks out?

A Well, I opened lots of cases.

Q Were you in the powder house at any time except that one day?

A Yes, I have been in the powder house lots of times.

Q Were you there the first day you went to work—in the powder house—did you go into the powder house?

A No sir, I did not.

Q Did you go into the powder house the third day—the day of the accident?

A Yes, I think so.

Q You were in the powder house twice the second day?

A Yes, as nearly as I can recollect.

Q What did you go into the powder house the third day for?

A For powder to spring the hole.

Q You sprung the hole in the forenoon?

A Yes, after we got a drill.

Q How many sticks of dynamite did you get to spring that hole?

A Well, we only used one stick to spring the hole—the first springing.

Q So you only got one stick?

A That is all we used that time.

Q So you used this powder to spring holes three times?

A As near as I can recollect.

Q And you loaded it into the bottom of the hole and then took the fuse and cap to set it off?

A Yes.

Q Now coming down to the time of the accident—what were you doing when Riley came in?

A I was sitting down turning the drill.

Q What was your partner doing?

A He was hammering.

Q How long was Riley in there before the explosion occurred?

A Not very long.

Q About how long?

A Not more than half an hour.

Q What were you doing during the time Riley was in there?

A Sitting down turning the drill.

Q What was Riley doing during the time he was in there?

A He was working charging his hole.

Q How much powder do they ordinarily put in a hole of that kind to blow out the rock—how much powder or whatever explosive you were using?

A All they can get in there.

Q About how much is necessary to blow that out?

A Well, may be twenty-five or thirty sticks.

Q Did you see what Riley's partner had with him when he came in?

A No sir, I was too far away to see what he had.

Q What did Riley have?

A Riley had a box and a tamping stick.

Q The other man didn't have the powder with him?

A No sir, not that I seen.

Q Was the box full that Riley had?

A I could not see him from the position I was in—I could not say what was in it?

Q About how many sticks did you say was held in one of those boxes?

A From one hundred sixty to one hundred and eighty sticks.

Q And for each one of those holes it would take twenty-five or thirty sticks?

A Yes sir, usually after they were sprung.

Q In charging these holes—these sticks of dynamite come wrapped in a paper, don't they?

A Yes.

Q And about how much are they in diameter—how large?

A Three-quarters of an inch.

Q And what are they in length?

A About eight inches.

Q Now he would take and pick up one of those sticks, would he, and push it in with a tamping stick or loading stick?

A His partner gave him the powder and split the powder and gave it to him and he shoved it in with a tamping stick.

Q What do you mean by splitting it?

A He would take his knife and cut the powder open.

Q That is Riley's partner would take a knife and take up a stick of dynamite and split it open with his knife and then hand it to Riley.

A Yes sir.

Q What shape was that powder in after the paper is split—what condition is it in?

A Almost the same shape.

Q Is it loose powder or just held together like a candle?

A It is not loose powder in there. It is mixed with something, I don't know what.

Q Mixed with something so that it holds its shape and form?

A Yes.

Q It is not loose?

A No.

Q Then he takes that and with that loading stick he pushes it in, doesn't he?

A Yes.

Q Now this hole was in there in this tunnel since the last—when did they explode those holes—the night before, wasn't it?

A Yes.

Q This hole didn't break out, did it?

A No sir.

Q When a hole does not break out, Mr. Carson, and the powder goes off in there, the hole will sometimes get clogged with pieces of broken rock, will it not?

A Yes, sometimes.

Q And you can't take and force powder in there with the wooden stick then, can you?

A Well you can shove the wooden stick in and clear the hole.

Q You can't always clear it with the wooden stick, can you?

A Very nearly, yes, except—

Q Well, you can't always do it, can you?

A Well, I never had very much trouble that way.

Q How?

A I never had very much trouble that way.

Q Is it not a fact that the only way you could open the holes then is with a steel drill or steel rod of some kind?

A Not with me.

Q You never heard of that in your life?

A I think I have heard of it all right.

Q Well, you have seen it done too, haven't you?

A No sir, I never did.

Q You never knew of it being done?

A By hearsay, but never by actual experience.

Q Your business is that of a driller?

A Yes.

Q You are not an expert powder man?

A My duties compel me to use powder.

Q Your duties compel you to use powder?

A Yes.

Q Were there steel drills there in that tunnel?

A Yes, I was using one.

Q There were other drilling men who worked over on the other side where Riley worked who were not working that day on that job?

A Yes, I was working on the other side from Riley myself.

Q There were other drills and other drillers who were not at work that day?

A I think they were all working that day, all that was there.

Q Now then, you don't know how this explosion occurred, do you?

A No sir.

Q You can't tell this jury just what occurred at the time of the explosion, can you?

A Well only what I saw, that is all I can tell.

Q What were you doing at the time the explosion occurred?

A I was sitting down turning the drill.

Q How's that?

A Sitting down turning the drill.

Q You were attending to your work?

A Well, yes.

Q Had you noticed what Riley had been doing for several minutes before that?

A Yes, I could see Mr. Riley all the time.

Q You could see Riley all the time while you were working at the drill?

A Yes.

Q And all at once the explosion occurred?

A Yes.

Q Did you see the explosion occur or was it over so quickly that you didn't see anything before your eyes—did you?

A Yes sir, I actually think I saw the explosion.

Q You actually think you saw the explosion?

A Yes sir.

Q Riley was standing in front of it, was he?

A Yes.

Q Riley was not killed?

A No sir.

Q He was not badly hurt either?

A He was pretty badly hurt.

Q That is, he was blown up but he had no bones broken?

A I don't know what he had broken. I know he had some ribs broken.

Q Did you see powder lying around there in the muck afterward?

A No sir.

Q You didn't see that?

A No sir.

Q You say you were unconscious for a time afterward?

A Yes.

Q You know where the explosion occurred, whether it occurred in the face of the cut or whether it occurred in the powder box?

A No, I could not say for certain where the explosion occurred, but it must have been in the face of the cut because the powder box would not bury so with muck if the powder exploded. It would not likely have buried so in the muck.

Q Now, the muck that buried you was what was blown out of the face?

A It was what was broke from that hole.

Q It broke out of that hole?

A Yes.

Q Where was Riley and his partner standing in reference to that hole?

A Right over the hole.

Q Right at the opening of the hole?

A Yes.

Q And this hole blew up, struck them first and then buried you?

A No sir, the weight of the muck came onto us. That hole broke sideways and it all came over onto us fellows pretty near.

Q What time did the ice go out so that boats could come up the Copper River that summer?

A It was in June sometime, I believe.

Q Wasn't it about the forepart of July?

A No, it was before July.

Q At any rate, it was after the accident before the ice went out?

A Yes.

MR. GRAVES: That is all.

MR. LUND: I wish to ask the witness some more questions but I will excuse him temporarily.

Q (By Juror) You spoke of the powder being bleached. Is that an indication of age, or what causes it to bleach—would it be moisture or age?

A I could not positively tell. It might be moisture.

Q It is an indication of defective powder though, is it?

A Well, I am not an expert.

Q (Mr. Graves) Just along that line—what you mean by bleached is that the paper which Riley's partner was cutting off, that that paper which was wrapped around the powder itself was a little bit bleached?

A Yes.

(Witness excused.)

E. S. McCORD, called as a witness on behalf of plaintiff, being first duly sworn, testifies as follows:

Q (Mr. Lund) You are a practicing attorney here and have been in the practice here a number of years?

A Yes sir.

Q You knew Mr. Heney in his life time?

A Yes.

Q And when did he die?

A October 10, 1910, I think that is the date.

Q Mr. Siegley is now executor of his last will and testament?

A Yes.

Q And you are one of the attorneys of record for the executor of his estate?

A Yes.

Q And you are familiar, more or less, with Mr. Heney's affairs?

A Yes, to some extent.

Q You represented him, as attorney, more or less, during his lifetime?

A I never represented Mr. Heney until about three months before his death.

Q I will ask you to look at identification A (showing) and tell us if you have ever seen that before?

A Yes sir.

Q Where have you seen that?

A It was brought to my office by Mr. Siegley, one of the executors of the M. J. Heney estate.

Q About what time was that?

A Oh, it must have been within a month or two after his death.

Q Where has it been since?

A Well, I think it was brought to my office in the first place by Mr. Siegley along the early part of 1911 and then it was returned to Mr. Siegley, and I think it came back into my hands some two months ago.

Q And in what light has that paper been considered by you, as one of the attorneys for the executor of Heney's estate.

MR. GRAVES: I object to that as irrelevant, immaterial and incompetent as to what light it was considered in by the witness, as not the proper method of proving a contract.

THE COURT: The point has been made, Mr. Lund,—I don't know that the counsel makes the point here—that the

original contract should be produced, but he does make the point that there is no proof that this is a copy; that no person who has seen the original has made any comparison between that and this. I do not feel clear that the light in which Mr. McCord, as attorney of the estate, regarded it would be evidence.

Q (Mr. Lund) I will ask you, Mr. McCord, if you have ever seen the original of that?

A No sir, I never saw the original. This was handed to me as a copy of the contract, but I never saw the original.

Q Where is the original to your knowledge?

A The original—I don't know that I could say definitely, but I think it is in the hands of The Katalla Company. That is my impression, however, only. I don't know.

Q In your dealings and in the dealings of the executor of Heney's estate with The Katalla Company in reference to the matters specified in that contract, that copy which you hold in your hand—what has that been taken to be between both you and The Katalla Company?

MR. GRAVES: I object to that as irrelevant, immaterial and incompetent. It is getting at the same thing in a round-about way.

THE COURT: If it can be shown that The Katalla Company has recognized this as a copy of the contract I think it is material, but the question is too broad and I will sustain the objection.

Q (Mr. Lund) You have heard the matter discussed, Mr. McCord—now tell what you know—what can you say with reference to it. You know more about the matter of getting at this thing than I do—tell us what you can, Mr. McCord?

MR. GRAVES: Do you want to associate him with you in the case?

MR. LUND: Go ahead.

MR. GRAVES: I think I have the right to have a question asked of the witness so that I can object to it.

Q (Mr. Lund) Can you state, Mr. McCord, that the paper which you have in your hands—the provisions in that—the provisions in that paper—the agreements made in that paper have been recognized by the Katalla Company, or the Katalla Com-

pany's attorneys as the contract between the Katalla Company and Heney in your dealings with The Katalla Company?

MR. GRAVES: I object to that upon the ground the question is incompetent and the evidence called for is incompetent.

THE COURT: The question calls for the opinion of Mr. McCord on that subject as to what has been recognized. What would amount to a recognition is a matter on which men would differ very much. If there is any evidence showing that any agent of the company has seen this copy of the contract and said it is all right, then, perhaps it might be shown. I will sustain the objection.

Q (Mr. Lund) Has any of the attorneys for The Katalla Company or any of the officers of The Katalla Company seen that contract or that copy which you have and recognized it and acknowledged it as being the contract in question?

MR. GRAVES: I object to that. The attorneys or any officers are not able to bind this company unless it is shown that it is some one who is capable of speaking for the company.

THE COURT: I will sustain the objection to so much of the question as relates to the attorneys, but as to so much of it as relates to the officers I will overrule the objection.

(Exception noted for defendant.)

A I will have to ask somebody a question. I do not know who the officers of The Katalla Company are. Mr. Young, or Mr. Youngs—if Mr. Youngs is an officer of The Katalla Company—I will have to know, your Honor, before I can answer the question.

MR. LUND: Do you know whether that is a fact?

MR. GRAVES: My understanding is that he is not—that there are no officers of The Katalla Company in Seattle. I can not state that definitely, but that is my belief.

A I can state—I don't want to volunteer anything—but I can state, if Mr. Youngs was, I could state that I talked to him.

Q (Mr. Lund) State what your dealings have been with Mr. Youngs?

A I don't know whether he is an officer or not.

MR. GRAVES: I object unless the witness knows.

A I am not able to state whether Youngs is or not.

THE COURT: The Court cannot take any judicial notice of Mr. Young's authority.

Q (Mr. Lund) I will ask you, Mr. McCord, if you will tell us in what respect you have dealt with Mr. Youngs?

A Well I have discussed with Mr. Youngs the relative rights of the M. J. Heney estate and the Katalla Company under this contract, as to certain phases of the contract. The discussion that I had was with Mr. Bogle and Mr. Youngs and Mr. Hawkins. I don't know whether those men are officers of the company or any of them, I can't say, but they discussed the matter with me.

Q Mr. Bogle is one of the attorneys of record in this case—you mean Mr. Bogle of Bogle, Merritt & Bogle?

A Yes, Mr. W. H. Bogle, yes.

Q In what capacity was Mr. Youngs, apparently, acting at the time?

A Well, we had a dispute over a certain clause in this contract as to certain charges for freight, or failure to carry freight up the river, and we used this copy of this contract in discussing it, and that is all I know, but I don't know whether Mr. Youngs—I don't know what his capacity was.

Q And at what time was that?

A That was about—that was before Christmas, shortly before Christmas last.

Q And what position did Mr. Youngs take in reference to that being a true copy of the original contract?

MR. GRAVES: I object to that on the ground that he has not shown any authority in Mr. Youngs.

THE COURT: I will overrule the objection, without passing upon the ultimate point involved in this question.

(Exception noted for defendant.)

A Shall I answer the question?

MR. GRAVES: My objection is that it calls for the expression of an opinion by some one not shown to be in any way connected with the defendant.

THE COURT: Whether this is binding on the company without further evidence, I do not now rule, but I think the testimony is competent so far as it goes.

(Exception noted for defendant.)

A Well, we—Mr. Shields, who was in the employ of the Heney estate—of M. J. Heney during his lifetime in the construction of the road—and myself went over to Mr. Youngs' office about three weeks before Christmas, as I remember the date—I am not positive—to discuss certain features of this contract and I had this copy with me, and we had occasion to refer to the clauses of the contract and I passed it over and Mr. Youngs examined that contract and Mr. Bogle, and I read parts of it and from that we based our discussion as to the relative rights of the parties as to that feature that we were discussing.

Q And in what capacity—apparent capacity—was Bogle acting at the time?

MR. GRAVES: I object to that as being irrelevant, immaterial and incompetent.

(Objection overruled. Exception noted for defendant.)

A He was attorney for the Katalla Company. May be there is some other party to that contract. I think there is. He was representing all except the M. J. Heney estate, as I understand it—I think it is a tri-party contract—I think there is some railroad companies that were interested in it.

MR. LUND: If there is I don't see it.

A I was not sure whether they signed the contract or were parties to it as being interested in it. I can't turn to it without making an examination, but it refers to two railroad companies—the engineer of the Copper River & Northwestern Railway Company and some other railway company—I think there are two of them in there, if I am not mistaken—I haven't examined it recently.

Q Now, Mr. McCord, I will ask you if you recollect that I spoke to you about that contract some time ago?

A Yes, you did.

Q And that you told me at the time that you or Siegley had the contract for the construction of the road?

A That was the contract that I thought we had.

Q You thought it was the original, didn't you, at the time you spoke to me?

A Yes, I supposed that was the original—I didn't have it in mind when you were talking to me, but I supposed it

was the original, and I felt so sure it was the original that today, since I was here this morning, I went through all the papers in connection with the Heney estate in my office thinking that perhaps the original was there, but it was not.

Q It was not there?

A No sir—at least I could not find it.

CROSS-EXAMINATION.

Q (By Mr. Graves) Mr. McCord, there are, as parties to this contract or parties to the subject matter, The Katalla Company, a corporation, and M. J. Heney and also The Copper River Railway Company; you do not know whom Mr. Youngs was apparently representing, whether The Katalla Company or the Copper River Railway Company, do you—he did not declare himself?

A It was not declared. I assumed that he was representing the Katalla Company.

Q You just assumed that?

A Yes.

Q (Mr. Lund) Had you any reason, during the conference, for that assumption, Mr. McCord?

A We took up the various matters connected with the construction of that railroad up there and went into them and discussed them and agreed on a certain line of procedure. There was a dispute as to the amount we owed. They claimed we owed them something and we claimed they owed us, and it is an unsettled account at this time. We took that proposition of settlement under advisement for a week or two, and that is the way the matter stands.

Q (Mr. Graves) Mr. McCord, do you know anything about a modification of this contract prior to 1910?

A Personally?

Q Yes.

A No sir.

Q You have heard there was such a modification?

A I have heard there was some slight modification.

Q You have no knowledge as to whether this was the con-

tract actually in force between The Katalla Company and M. J. Heney in the spring of 1910—you can't state that from your own knowledge?

A I could not state it from my own knowledge, but so far as the contract is concerned, Mr. Graves, I understand it is the contract that exists, with the exception of one clause in regard to some powder—now that was only hearsay.

Q (Mr. Lund) One clause in reference to what?

A I say there was one clause that I understood was changed—I have heard rumors of it—I don't know definitely—in regard to the powder.

Q In regard to what?

A In regard to some powder.

Q What was the nature of that clause?

MR. GRAVES: I object to that. I simply went into it for the purpose of showing whether or not this was the contract between the parties.

THE COURT: The witness says this is entirely hearsay, and it is incompetent.

(Witness excused.)

HERBERT CARSON, recalled on behalf of plaintiff, testifies as follows:

MR. GRAVES: Objected to as immaterial and as being a hypothetical question upon which the witness has not been shown to be competent to testify.

THE COURT: I will overrule the objection—that is, whether it appeared to be just opened up or had been going some time, judging from general appearances, I think it is proper.

(Exception noted for defendant.)

A It appeared to me to have been going from about six weeks to two months.

Q And you say that the men went out of the tunnel when you sprung the holes?

A Yes.

Q You mean that they went out of the tunnel before the explosion occurred?

A Yes.

Q Or do you mean that they went out of the tunnel when you were loading the powder into the hole?

A Well, the general way was to load the holes and then we would all go out of the tunnel before the explosion.

Q Now you say that you don't know how the explosion occurred?

A No sir.

Q You know what you saw there at the present time?

MR. GRAVES: I object to that as argumentative.

THE COURT: Anything that he saw that he has not already testified may be shown, but he has gone over that ground.

MR. LUND: That is all.

(Witness excused.)

I. F. LAUCKS, called as a witness on behalf of plaintiff, being first duly sworn, testifies as follows:

Q (Mr. Lund) State your full name.

A I. F. Laucks.

Q You reside in Seattle?

A I do.

Q How long have you lived here?

A Six years, I guess.

Q And what is your occupation or business?

A Mining engineer and chemist.

Q In business here?

A Yes.

Q A graduate of what institution?

A Key School of Applied Science.

Q Where is that?

A Cleveland, Ohio.

Q When was that?

A 1904.

Q Since that time what experience have you had in the handling of dynamite?

A Well, I have worked underground—when I first came

out of college I worked about a year underground drilling, mucking and one thing and another until I got practical experience, and then had charge of property. I worked underground from mucker to engineer and I had general experience in mining.

Q When you refer to properties, you mean mining properties?

A Yes.

Q You have had charge of mining properties as engineer in charge?

A Yes.

Q And you are also a chemist?

A I am.

Q Tell us what does dynamite consist of?

A Dynamite—the ordinary term dynamite means nitro-glycerine absorbed by some absorbant material, such as infusorial earth or sawdust, wood pulp and so on. That is the ordinary—that is the simplest form of dynamite, though a great many powders on the market have other substances in connection with them, explosive in themselves or combustible in themselves.

Q What percentage of nitro-glycerine and what percentage of filler does dynamite ordinarily contain?

A Well, there are different grades, running all the way from 75% down to say 30%.

Q 30% of what?

A Nitro-glycerine and the different other inert material or other substances added, which may be explosive.

Q What do you understand by the term nitro-glycerine?

A Nitro-glycerine is a chemical compound—I don't suppose you want me to go into the chemistry of it very far?

Q Go right along.

A —but it is a combination of glycerine and nitric acid to form what is called in chemistry a nitro-compound of glycerine.

Q And that is the explosive part of dynamite, is it?

A Yes, that is its main explosive. In some of the patent preparations on the market there are also explosive compounds in them, but nitro-glycerine is generally the main explosive.

Q What is the purpose of mixing the nitro-glycerine with the absorbent?

A The purpose is to render it safe to handle. That is, pure nitro-glycerine is a very hard substance to handle with safety and to ship any distance, but when it is absorbed by some inert material and absorbed by some powder it becomes much more safe to handle and to be shipped about the country and so on.

Q What can you say as to whether nitro-glycerine mixed in that way with some other substance in a solid form is less susceptible to shock causing explosion than in its pure state?

A It is much less susceptible, yes.

Q How does time affect this mixture, Mr. Laucks?

A Well, time affects it generally because the conditions that affect nitro-glycerine, the longer a time it has been stored the more time those conditions have to act on the nitro-glycerine. To make my point clear, you take for instance the case of moisture; in a moist climate dynamite has a tendency to take up moisture and to displace nitro-glycerine. Now the longer that goes on—the longer it has been stored in a moist climate, of course the more that effect is pronounced.

Q And what is the result of that?

A Well, the result of it is that the dynamite that has been stored for some time in a moist atmosphere, the nitro-glycerine comes to the surface, either underneath the wrapper or gets through the wrapper and collects in drops, or sweats, as the miners call it, and in that condition it is very dangerous, because you have then free drops of nitro-glycerine there, and it is a well known fact that it is a great deal more dangerous in that condition and that a great many accidents happen due to thawing and one thing and another.

Q What can you say as to whether dynamite two and more years of age is reasonably safe to handle?

MR. GRAVES: For the purpose of preserving the record I reserve an exception on the ground that it is calling for the opinion of the witness in answer to a hypothetical question not based upon any proven fact in this case or upon any evidence.

(Objection overruled. Exception noted for defendant.)

A Well, that depends a great deal upon how it has been stored and the precautions that have been taken in storing it, but in most cases I should say that I would hesitate to use dynamite that was two years old unless I knew exactly how it had been stored and all its past history. I think, as a matter of precaution, any conservative man would do that.

Q (By Mr. Lund) State whether or not an inspection of the dynamite by a person understanding it will—persons understanding such things—will give information as to its condition?

A It will, yes.

Q State whether or not it would be reasonably safe to give out for use dynamite two years old or more, without an inspection.

MR. GRAVES: I object to that on the same grounds last stated.

(Objection overruled. Exception noted for defendant.)

A I don't think it would be reasonably safe. I would not do it myself, and I don't believe it would be safe.

Q (Mr. Lund) If it appears that the wrapper of the dynamite is moist, with an oily moisture; what does that indicate, Mr. Laucks?

A Well, I suppose by oily moisture there you mean an oily substance or an oily liquid?

Q Yes.

A It most certainly indicates nitro-glycerine. At least, from your question it would indicate nitro-glycerine, because that is the only thing in dynamite that is of an oily nature.

Q Now, I will ask you this question: Assume as a fact that some men are working in a tunnel on the railroad construction; and a box of dynamite is brought into the tunnel; with the sticks to be used in loading the hole, and two men are loading it, one man is cutting open the wrappers and the other is shoving the powder down into the hole with the loading stick, consisting of wood, in the ordinary manner of loading dynamite, and while in the act of doing so an explosion is caused by the dynamite in the hole; the dynamite that is used in loading it being more than two years old; that the wrappers

are moist, with an oily moisture, discolored—what would you say was the cause of that explosion?

MR. GRAVES: We object to that question for the reason that it is propounding a question which calls for an answer of the witness that it is the province of the jury to give. It includes the whole contention of the plaintiff and is not a hypothetical question based upon facts shown in this case, tending to prove some one point in the case. Secondly, upon the ground that the two main facts upon which the witness is asked to base his answer, namely that this powder was two years old, that it was wrapped in a paper that had a wet oily appearance, are facts that are not shown to the jury and have not been proven.

THE COURT: The jury will have to determine what the facts were from the evidence. The jury can say how much of the evidence in the case they accept as satisfactory and as correct. And what inferences they draw from them with reasonable limits. It is also a question for the jury as to whether that question clearly states the facts. If it does not the jury will bear that fact in mind.

(Exception noted for defendant.)

MR. LUND: Do you remember the question?

A If the loading of the hole was properly done—your question was if the hole was loaded in the usual manner, I believe?

Q By the use of a loading stick, one man cutting up the powder and the other shoving it in in the usual and careful manner of loading powder, with the facts that I assumed?

A If the loading was properly done, I should say that the probability was all in favor of—in fact there is nothing else—there is no other answer to that question except that the dynamite was at fault.

Q And in what way would it be at fault?

A Well, it might be at fault in a number of different ways.

Q Assuming that the wrappers were as I stated to you, and assuming that the condition of the powder was as I stated to you now?

A From your description of the powder and the appearance of the wrapper I should say that it had been a case of the dyna-

mite being subject to moisture and the nitro-glycerine exuding on the surface—sweating.

Q Tell the jury what is the ordinary, proper and careful manner of loading dynamite into a hole in a mine or tunnel?

A The proper manner is to slip (slit?) the cartridges, shove them in the hole with the wooden stick, using no metal whatever, and to press them carefully and tamp them—not by hard blows but by pressure alone—to have the sufficient amount of powder in the hole—then to prepare the last cartridges, or the last cartridge, by making a hole in it and inserting your fuse and cap properly crimped—sacked if necessary, if it is a wet hole—and then fastening the cap securely in the cartridge and shoving them in the hole and gently tamping that and then putting tamping over the top of it.

Q Can you say, if dynamite is loaded in that manner, it is the ordinary and safe way of loading it—what can you say, if there is anything mysterious about dynamite, or something that no one can understand—what would you say as to that?

A No, there is nothing mysterious about dynamite. The properties of dynamite are well known; by that I mean the chemical properties—of course the other properties are generally too.

Q A premature or unexpected explosion of dynamite will not occur without some cause?

A Most certainly; there must be some cause for it.

Q To go back again to the making of dynamite and the effect of age upon it—what is known as spontaneous combustion—that it may explode by itself—what are the causes of that?

A The cause—well, there are several causes of that. One cause is improper manufacture, to begin with—the leaving of free acid which is used in the manufacture—if the nitro-glycerine is not watched properly, to begin with, and there is any free acid left in it that free acid—the mere presence of the free acid tends to cause decomposition of the dynamite. This decomposition proceeds with age, and in such a state, when partially decomposed, the nitro-glycerine is extremely subject to shock, or it is liable to go without any apparent excuse at all for it—simply go off from what we call spontaneous decomposition, or spontaneous explosion. That is one reason. An-

other reason is due to impure materials in manufacture. A third reason is exposure to a high temperature. If dynamite is exposed to a temperature, say, of 100 to 110 degrees Fahrenheit, it is liable to the same action—and moisture will also cause the same thing, and the action of direct sunlight sometimes has been known to cause it also. There might be other reasons I don't think of.

Q Dynamite in that condition, or in such a condition that it is liable to spontaneous explosion or decomposition—what can you say as to what amount of shock—whether a light touch or a heavy touch—is required to explode it?

A Well, it has been known to go off without any touch at all.

Q And a small shock—

A (Continuing) —so that, if it does that, of course the more shock that is applied to it, the more likely that it is to go off.

Q If it appears that the dynamite is more than two years old and that it has discolored the outside of the wrapper and that there is an oily moisture or substance around the wrapper—what causes could have brought about that condition?

A Well, the causes that I have just enumerated.

MR. GRAVES: I desire to interpose the same objection that the question is not based on any fact in this case.

(Objection overruled. Exception noted for defendant.)

THE COURT: The jury will understand that it is not the province of the Court to decide what the evidence in the case is, but anything that counsel can reasonably contend is established by the evidence may serve as the basis for admitting other evidence. Whether there is any real foundation for such evidence in the case is a question for the jury.

MR. LUND: I believe you answered that before?

A I believe I answered practically that same question before.

CROSS-EXAMINATION.

Q (Mr. Graves) Counsel asked you if there was anything mysterious about dynamite. The real mystery occurs, does it

not, when the dynamite and the man who is using it get together—that is where the difficulty arises, is it not? The mystery arises, in other words, in the handling of it?

A I said there was no mystery, I believe.

Q —in the dynamite itself—but I said the mystery arises when the man comes to handle it. In other words, dynamite is a very dangerous agency, is it not?

A It is, to a certain extent, yes.

Q Nitro-glycerine is a dangerous substance?

A It certainly is if it is applied rightly.

Q In the handling of it many accidents occur—that is true, is it not—a great many accidents occur in the handling of it?

A Are you referring to nitro-glycerine or dynamite now?

Q Put it dynamite—many accidents occur in the handling and use of dynamite?

A If you make that misuse of dynamite and an improper handling, I will say yes.

Q That is exactly what I mean.

A Yes.

Q In the handling of dynamite there are many accidents, whether it comes from mishandling or otherwise, there are a great many accidents?

A Yes, quite a number.

Q And the rule is, is it not, that accidents from the use of dynamite come through the improper use of it—improper handling of it?

A Generally.

Q And when you hear of an accident occurring in a mine through the use of dynamite, it is generally because somebody has been negligent in the manner of its use, is that not true?

A I believe that the greater proportion of accidents due to dynamite are due to that cause.

Q Now then, counsel put this question to you, that if this dynamite was deteriorated so as to be very dangerous and that it was being loaded in this hole properly and carefully and it went off—you said that your conclusion would be that it went off because the dynamite was in a dangerous condition?

A Yes.

Q Because there could not be any other cause under his question, could there be?

A No sir.

Q And that was the reason you answered it that way?

A Yes.

Q If I should say to you, however, that it not appearing that there was anything wrong with the particular dynamite and that on the 26th day of May, 1910, a man brought some dynamite into a tunnel, that it does not appear what the age of that dynamite is or that it had deteriorated in any respect; that that dynamite was taken and loaded into a hole that had been blown out before—which dynamite had been exploded in—and that in ramming that powder into that hole there was an explosion. What would be your judgment as to what caused it—there not appearing anything one way or the other as to the condition of the powder?

A That is a pretty broad question to answer.

Q It does not require an expert to answer that—it requires a little common-sense, isn't that about all?

A Well, I can't answer that question unless I know some of the conditions. If you say they simply loaded it into the hole, I don't know how.

Q Without any knowledge that that powder was good or bad; without any knowledge as to exactly what the man was doing to it at the time the powder exploded, you can't tell what caused the explosion, can you?

A No, I could not.

Q It is pure guess-work?

A Yes.

Q That statement being made to you though, in a great majority of cases, it is a fact that the man has improperly used the powder, is it not?

A Well, when applied to loading I don't think it is, because most of the accidents due to the use of dynamite occur in thawing the dynamite.

Q You have heard of cases where the holes have failed to blow up?

A Yes.

Q That generally makes a jagged hole where the drilling has occurred, it is apt to splinter the rocks?

A Do you mean a misfire or the hole—

Q Misfire—I mean where the explosion of the dynamite has failed to blow it out?

A It has exploded but it has not broken the ground?

Q If has not broken it out?

A It just exploded in the hole?

Q That is apt to shatter the hole?

A It usually does, yes. It generally cracks the surrounding rocks at least.

Q Such a hole is much more dangerous to fill than a hole that is evenly drilled out, is it not?

A No, I don't think so, I don't believe it is. It might be under some circumstances, but ordinarily I don't think it is.

Q Have you had any experience with cases of that kind?

A I have.

Q Now, Mr. Laucks, as I understand you, time in showing any deterioration of dynamite is chiefly influential in that regard because it gives so many opportunities for the nitro-glycerine to separate from the sawdust or other inert substance?

A That is one of the reasons, yes.

Q If it is kept at an even temperature, preserved from extremes of heat and cold and preserved from moisture it takes longer to deteriorate than it otherwise would?

A It does.

Q If you take dynamite and unload it, haul it over the ice, and lay it out in the snow and put it in sheds for five or six weeks, so that the wrapper becomes discolored by moisture—that treatment and that method of handling it would cause it to deteriorate rapidly, would it not?

A It would—a moist climate.

Q If dynamite is put in a wet or damp place and held for five or six weeks, it would deteriorate very rapidly under those conditions?

A It would.

Q Dynamite that has deteriorated, as you say, so as to go off suddenly, easily, that will occur whenever it is given a very severe shock, will it not?

A Not necessarily a severe shock. It will when it is given a severe shock, but if you mean whether it needs a severe shock—

Q I say a severe shock will explode it?

A Yes.

Q If a box of dynamite is put near a hole where a blast has exploded suddenly and if the box of dynamite is blown to pieces and the dynamite is scattered all around over the surrounding rocks in the tunnel and that dynamite does not explode, would you say it was badly deteriorated?

A I hardly heard the question.

Q Suppose that I have a box of dynamite situated in front of a hole and I explode the hole so that the box of dynamite is blown all over the rocks and the dynamite is blown all around over the rocks in that neighborhood and it does not explode, is that dynamite very badly deteriorated?

A No, I should not say that it was.

RE-DIRECT EXAMINATION.

Q (Mr. Lund) To what extent would it be deteriorated?

A How is that?

Q Does dynamite sometimes get to such a state that it won't explode at all?

A It does when it is frozen.

Q If those remaining sticks in the box were frozen they would not be liable to be exploded by the explosion in the hole, would they?

A Dynamite that is frozen is very hard to explode.

Q Assuming that the box was not, as stated by counsel, in front of the hole but that it was alongside of the hole and the explosion took place in the hole, the force of the explosion taking effect away down at the bottom of the hole and loosening the rock, and that two men in front of the hole that were doing the loading were not killed, what would you say as to why that powder or dynamite in the box was not exploded?

MR. GRAVES: I object to that on the ground that it does not call for an expert opinion.

(Objection overruled. Exception noted for defendant.)

A Well, there are several possibilities there. One that it is frozen and the other that it is good dynamite and got the full force of the blow; and the other is that it didn't get the full force of the blow in such a way that it would explode it. What I mean is, to set off an explosion requires a certain kind—with good dynamite, requires a certain kind of blow, that it requires a certain kind of force to set it off—it is pretty hard to explode it.

Q Assuming that this dynamite, having the appearance that I have described to you of discolored wrapper and oily substance around the wrapper, is more than two years old—very nearly three years old—that it is delivered to a place on the work about six weeks or two months before an accident happened in the use of it, and from the time that it is delivered on the work until the time of the accident it is kept in a shed—a powder-house constructed of logs and boards, so as to be free from moisture and wet; what would you say as to whether the condition of the powder was brought about before it was delivered on the premises or afterward?

MR. GRAVES: I object to that as not a proper hypothetical question for an expert, and as argumentative pure and simple.

THE COURT: As I understand it, the question reads if the dynamite was kept in a dry place during the six weeks before it was used, when did it become deteriorated?

MR. LUND: Yes.

THE COURT: I think that has sufficiently appeared from the testimony of the witness already. If there is any further points you want to bring out on that you may do so.

Q (By a Juror) I would like to know whether dynamite confined is more susceptible to explosion than when it is loose?

A You mean dynamite, now, and not nitro-glycerine?

Q Dynamite?

A You mean—yes, if it is confined tightly; for instance, if it is placed in a metal tunnel, then it is more susceptible to explosion. That is the object of placing it in paper cartridges so that it is not confined—so that it will give when anything happens to strike them. Where it is put into a drill hole it is no more susceptible to an explosion than if it was lying loose

on the ground. The force of the explosion is greater but it is not more susceptible.

(Witness excused.)

FRED JOHNSON, called as a witness on behalf of plaintiff, sworn, testified as follows:

Q (Mr. Lund) You went up there to Alaska with Mr. Johnson here.

A I can't hear good.

Q Now then, when you want me to speak loud, you speak loud, too.

A Yah.

Q You live in Roslyn?

A Live in Roslyn.

Q And you are a miner?

A Yes.

Q How long have you been a miner?

A Twenty-two years.

Q And you went to Alaska with John P. Johnson?

A Yes.

Q And traveled up there with him, together with him?

A Yes.

Q And you went to work with him on Section 119?

A Yes.

Q And started mining with him there?

A We started to drill together.

Q You started drilling together there and when he left there and went to Section 123 you went with him?

A Yes, we went together.

Q And what time did you go to Section 123?

A About the 24th of May, or the 23d—I worked nineteen days.

Q And then you started to do what work?

A Drilling.

Q In the tunnel?

A Yes.

Q And who was drilling with you?

A John Johnson.

Q This man that is suing here? (pointing).

A Yes.

Q And how many days did you work in there before the explosion occurred?

A We worked two days and a half and about an hour more than a half a day.

Q On the 27th day of May, this explosion took place?

A Yes.

Q And where were you—you were working in the tunnel at that time?

A Yes.

Q And what work were you doing there?

A I was drilling.

Q And how far from the hole that was being loaded?

A About twelve or thirteen feet.

Q And were you using the hammer or were you turning the drill?

A No, I turned the drill.

Q Can you tell us in any way what you saw about that explosion and how it came about?

A Well, I saw them come in with the powder—Riley came in with the open box of powder, I am not quite sure—about three-quarters of a box—and he had his partner in there, and he comes in with the box of powder and the loading stick—a wooden stick.

Q Who did you say came in there with the powder and the loading stick?

A Riley.

Q Riley?

A Yes.

Q And who was with him?

A He had a box of powder on one side and a loading stick—a wooden stick.

Q The wooden loading stick in the other?

A Yes.

Q And what did he start to do?

A His partner was in there, and they started to clear out the hole—they cleared out a little dirt out first.

Q And in what manner were they loading—how were they loading that hole?

A His partner was cutting up the powder with a knife and he was behind, and handed it to him and he put the powder in the hole and pushed it in with the loading stick.

Q And what happened—what took place?

A Well, I was sitting, looking like that, working with the drill, and he gave him one stick after the other and put it in and I looked around, and I looked, I know, as I was turning the drill and I see come a white light come and the explosion come. As soon as the explosion come I don't know anything for the time—I rolling backwards and forwards and the smoke and I was rolling and at last I come down pretty near to the face of the tunnel and I could not walk on one leg, and my pants—them overalls was split up right through there and I jumped on one leg. I see a light outside, for I got my senses still, and I jump on my one leg.

Q Now at that time you saw that white flash of the explosion, what was Riley doing with the loading stick?

A He was putting in powder in the hole with the loading stick.

Q In what manner was he putting it in?

A He put it in the hole.

Q Was he using any unusual force, or was he doing it in the ordinary way?

A Eh?

Q You don't understand me—was Riley putting it in with any unusual force—how was he loading it?

A No, he was putting it in easy with the stick, putting it in easy.

Q How long were you laid up there after the explosion?

A I was laid up that day and I was working clearing up the next day.

Q And did you keep on working there?

A Well, they were drilling and clearing up that muck—that muck from that hole that broke.

Q And you kept on working there?

A Yes, I was working there.

Q Did you see the dynamite that was used there at the camp before the explosion?

A Yes, I see some of it, yes.

Q Where was it kept?

A Well, I don't know.

Q Where did you see it?

A I saw them blasting in the tunnel.

Q And what did the dynamite look like?

A It looked kind of dry—that it had kind of black splotches on the covering of it.

Q And did you see the date stamp on the dynamite?

A Yes, I see the stamp.

Q What was the date and the stamp on it?

A There was a twenty and a fifteen—15th day of May, 1907.

Q And what did the paper on the outside look like?

A It was kind of dry and wet and kind of black spots on the covering.

Q On the covering?

A Yes.

Q Tell us whether or not there was any indications that you could see of any oily substance or moisture on it?

(Objected to as leading.)

A Well, that is more than I could say—there was some.

Q How long did that dynamite remain at that place—how long had it been kept there—how long did they keep it there after this explosion?

A I don't know how long—I don't know that they kept it at all.

Q Do you know Mr. John A. Johnson?

A Yes.

Q Do you know when he came to that place?

A He was in the same company I was.

Q But he was not on the place at the time of the explosion, was he?

A No.

Q When did he come there?

A I think it was the day after.

Q Was the same dynamite when he came there as was there when the explosion occurred?

A Well, we didn't see—we didn't see no dynamite right after.

Q And did they get in any new dynamite in the meantime?

A Yes, they got the new dynamite in there.

Q I mean between the time of the explosion and the day that Johnson came up there?

A No, they was none new, and they didn't use any either.

Q What I want to ask you is if the same dynamite was on the place there?—

A Yes.

Q — when Johnson came up there that was there when the explosion occurred?

A The same dynamite was there, yes.

Q There had no new dynamite come in there in the meantime?

A No. There was no new dynamite came when he came there.

Q And who was the boss there?

A I don't know. I know his name—they called him, I forget his name.

Q You know the company's engineer?

A Yes.

Q The one that was in charge there?

A The engineer.

Q The engineer in control there?

A Yes—he keep the tunnel in shape.

Q Yes—by what name did he go—what was his name?

A I don't know his name.

Q Who was he representing there, do you know—do you know who he was there for?

A Yes, I know what he was there for.

Q I asked you who he was there for, if you know?

A I think that Katalla Company he work for.

Q What was he doing?

A He was engineer.

Q Engineer?

A Yes.

Q Tell us whether or not if you heard him make any statement in reference to that powder within a day or two?

A Yes.

Q Within a day or two after the explosion?

A Yes.

MR. GRAVES: I object to any statement by some one whose name he doesn't know and whom he claims was an engineer, after the explosion.

MR. LUND: He was the engineer in charge of that work at the time of the explosion, from his testimony, and his admission is admissible.

(Objection sustained.)

CROSS-EXAMINATION.

Q (Mr. Graves) When did you go to camp 123?

A It was the 24th and 23d some time.

Q Of May?

A Of May.

Q You went with John P. Johnson?

A Yes, with Yohn Yohnson.

Q You worked there two days and a half?

A Yes sir.

Q Did you work any after the explosion?

A Yes, I worked after the explosion.

Q You worked there after the explosion?

A Yes.

Q How long did you work there?

A I worked there till the tunnel was through.

Q Did you ever go into this powder-house?

A I was not in there, no.

Q You had seen a box with a stamp on it—where was that stamp—on the end of the box or on the end of the powder?

A On the side of the stick.

Q On the powder?

A On the stick.

Q On the stick?

A Yes, yes.

Q (Mr. Lund) Where was the stamp on the stick, was it on the wrapper?

A Yes, on the paper.

Q On the paper?

A Yes.

Q And did you see any stamp on the box—on the wood?

A I didn't look on the box.

Q But you saw the stamps on the—

A On the stick of powder.

JOHN ANTONE JOHNSON, called as a witness on behalf of plaintiff, being first duly sworn, testifies as follows:

Q (Mr. Lund) You live in Seattle?

A Yes sir.

Q Any relation to Mr. Johnson the plaintiff in this action?

A No sir.

Q How long have you known him?

A Nine or ten years, since I came to this country.

Q What is your occupation and business?

A My occupation is miner—I am doing lumbering work now at the present time.

Q And you went to Alaska in the spring of 1910 with Johnson and those other men?

A Yes.

Q And what can you say as to conferences you had in Cordova with any one in reference to going to work?

A We were a gang of ten or eleven men together that came down from Seattle; we came down to the offices on the dock and we had one spokesman named Mike Nugent, and he spoke to the clerk in the office while we were there and he got the pass and we got a meal ticket and went up on the station and took the train up to mile 49 from Cordova.

Q Go on.

A And we had from Seattle—we got a note to Mr. Murchison that we had answered an ad in a newspaper calling for men to work on the section up there and when we came up to 49 the first thing we did we have our meal and we walk across the ice; on the other side we had to wait until the train came in with those flat cars and box cars with lumber and material and so on.

And they had ferries going across and there was a narrow strip of water cut through the ice and they loaded all kinds of material and a lot of powder amongst them, and we got over there on the north side of the river and we were told to go to work and start in help packing powder, and so we did and we put it on the snow bank, along the railroad track, and the train came in and we all went in the box car, I don't know how many, a couple of hundred men altogether I guess, and then went up to Tiekill, and when we got up to Tiekill the next morning, in the morning we saw Mr. Murchison about work, as we were expecting to go to station work. He said he had not station work at the present time, that he would see later on, but he says "You fellows have to go up and go to work." And then he give us a note up to George Raildy—he was the foreman of mile 119, and we brought the note up there with us and we all came there, all that went up there and started work and I kept on working there.

Q And you all went on station 119?

A Yes sir.

Q You and Johnson and some other men?

A Yes.

Q And when Johnson and Carson and his partner left there and went to 123, did you go along?

A No sir.

Q You remained at ——?

A I remained at 119.

Q And how long did you remain there?

A The day after the explosion a man came down and said they wanted men up there—the man went down to Tiekill to get the foreman, and I asked him if there was a job up there and how much they paid and he told me how much they paid—they would increase the wages—and I went up there a couple of days after the explosion occurred.

Q A couple of days after what?

A After the explosion occurred.

Q What was the first you knew about the explosion?

A When this man came along the line.

Q And told you about it—what did you find out when you got up to 123?

A I first stopped at 122, where the hospital was, to see Mr. Johnson. I found him in bed.

Q Just answer my question—what did you find out when you went up to 123?

A I found the tunnel.

Q How far was the tunnel in?

A Well, I could not say, twenty-five or thirty feet, I should judge, at that time.

Q What was the work going on there?

A Yes, there was a little work going on, shoveling.

Q Shoveling out the—?

A Loose dirt, the muck.

Q The broken rock in the tunnel?

A Yes.

Q And what did you next do?

A I drilled.

Q What did you find the men kept their dynamite in?

A They had a log cabin that was called the powder-house.

Q Built of logs?

A Built of logs and boards.

Q In what way was it protected from the weather?

A It was boards on the ends and canvas on the top, boarded tight, with a made door.

Q Did you see the dynamite that was in the powder-house?

A I saw some of it.

Q What was its condition?

A Well, it was pretty bad looking.

Q In what way did it look?

A It looked—the papers were yellow on the outside and spotted.

Q Was there any stamp or date on it?

A Yes sir.

Q What was the date?

A 15th of May, 1907.

Q And where was that stamp?

A On the side of the paper.

Q On the dynamite stick?

A On every stick, yes.

Q What did you say?

A On every stick of powder it was stamped.

Q It was stamped on every stick of powder?

A Yes.

Q The men that were in charge of the work there—?

A Yes.

Q Who was the boss of the tunnel?

A Sam Rollin was the boss of the gang.

Q He and some others had the station contract?

A Yes.

Q Who was the engineer in charge?

A Mr. Wingate.

Q How large a section of the road did he have under his supervision?

A Well, as far as I have seen, he worked from 121, I think, to 132, up to Chitina, I think up to the crossing of the river. I know I saw him way up there.

Q What did he do?

A His work consisted of surveying the road and giving points to the men how to turn the tunnel from one side to the other, keeping the grade of the road.

Q What orders or directions did he give?

A He told them which way to start a hole, how high up they were going to have it or how low they were going to go with it.

Q Who was building that road, if you know?

MR. GRAVES: I object to the question in that form, he can state the fact that he observed.

THE COURT: With a large enterprise like this there are very often many engaged in the building, from the owner down to the workingmen, and I think the question is too broad, unless the witness has some definite information on the subject.

Q (Mr. Lund) What do you know about the method of constructing the road, Mr. Johnson, and who it was that built it and who Mr. Wingate represented—tell us what you know about it?

A Only what I heard and what I understood, that Mr. Wingate—

MR. GRAVES: I object to the witness' answer to that question—it shows that it is based on hearsay.

(Objection sustained.)

Q (Mr. Lund) Where did Mr. Heney's men live?

A How?

Q Where did Mr. Heney's men in the construction of that work, where did they reside?

A Their headquarters was in Tiekill.

Q Their headquarters was in Tiekill?

A Yes sir.

Q Was there any special mark or sign upon Heney's property?

A I think every tent was marked "M. J. H."

Q And this engineer, Mr. Wingate, where did he reside?

A Mr. Wingate, I could not tell you exactly, mile 123 I think he resided at.

Q Did he reside in any of Mr. Heney's camps?

A Not to my knowledge.

Q Whose camp did he reside in, if you know?

A What they called the engineer's camps.

Q I will ask you whether or not you have any opinion from what you saw up there as to who Mr. Wingate represented?

MR. GRAVES: We object to his drawing his conclusions.

THE COURT: If there were any signs there or any physical facts, he may so state, but as to what any one told him I don't see the materiality of it.

MR. LUND: I will withdraw the witness temporarily.

(Witness excused.)

JOHN ANTONE JOHNSON, recalled on behalf of plaintiff, testifies as follows:

Q (Mr. Lund) Now I will ask you, Mr. Johnson, what was the nature of Mr. Wingate's duties up there at the camp, as he performed them?

MR. GRAVES: Ask him what he did, so there will be no misunderstanding.

Q (Mr. Lund) What did he do up there?

A He gave the grade, the survey as you call it, giving the grade, giving the directions to the men which way to work to drill the holes.

Q And in reference to the explosives?

A He told them not to use that bad powder no more.

Q When was that, Mr. Johnson.

A That was a few days after the explosion.

MR. GRAVES: I move to strike that out, upon the ground that any statements or declarations by an agent made after the occurrence of an act is not evidence, and it comes under the ban of being merely hearsay and it is not within the scope of the employment of any agent.

I call your Honor's attention specifically to the case of "Cook versus The Stimson Lumber Company," reported, as I recall, in about the 40th Washington State Reports, where it was allowed to be testified that the manager of the Stimson Mill Company the day after the accident stated that the particular logging engine or logging train which was being operated at the time of the accident was operated negligently and that it had the defects which were alleged in the complaint; that proof being admitted, the statement of the agent not being within the scope of his employment was held not to be binding on the company, and as prejudicial, and the Supreme Court reversed the judgment in which a verdict of Fifteen thousand dollars was given to plaintiff, and sent it back for new trial. That decision was supported by a careful examination of the authorities touching the proposition. Here is a declaration made—we are supposed to meet anything which may have been done by our agent in the course of his duties, but that that agent may at any time subsequent to the happening of the accident make a statement or a loose declaration, or any witness can come on here and testify as to any statement made by such man, in what way can it be anticipated? The danger of it is obvious. The lack of authority of the agent to make such a statement is obvious.

(After further argument on the motion the Court ruled as follows) :

THE COURT: I think it falls within the well recognized rule that what an employee says some time after an occurrence is not evidence against the employer. He is not employed to

make that admission, and if he forms a conclusion of his own and gives utterance to it, that is not binding. If this party has any information, the way is to get at him, and to make him a witness, and not to take his unsworn and, very likely, unconsidered statement made to a man in the street as evidence of a fact. I will sustain the objection and the motion to strike will be granted. The jury will be instructed not to consider as in the case the remark attributed to the engineer. Proceed.

MR. LUND: For the purpose of the record—the jury will understand that my statement is not to be considered as evidence—I wish to make an offer of proof in this case in this matter. I offer to prove by the testimony of this witness that two days after this accident Mr. Wingate, the resident engineer for the Katalla Company.

MR. GRAVES: I do not desire to be captious about the matter, but the question was asked, answered and stricken—it is all in the record.

MR. LUND: But not the particular matters that I wish to have the question raised upon.

MR. GRAVES: Well, I suggest you put it in the form of a question, so that the Court can rule upon it.

MR. LUND: It all goes in under the ruling that is already made.

MR. GRAVES: Then the offer had better be made after the jury retires at twelve o'clock.

THE COURT: If you have any further question you had better put it, Mr. Lund. Of course one reason for the exclusion of testimony of this kind is the ease with which such testimony can be manufactured; that is one reason, no doubt, for the existence of the rule.

Q (Mr. Lund) At the time that Mr. Wingate made that statement, where was he, Mr. Johnson.

MR. GRAVES: I object to anything in reference to or that relates to the matter which the Court has stricken.

(Objection overruled. Exception noted for defendant.)

A Mr. Wingate was standing with Mr. Rollin and several other men and myself; I should judge by the blacksmith shop, which is about from sixty to seventy feet away from the face of the tunnel north of the end of the tunnel.

Q (Mr. Lund) How long was that after the explosion?

A About three days after; I can't exactly say the date. It was the first day I was up there—the third day after I started to work.

Q And what did he say as to where that powder had become defective and dangerous?

(Counsel for defendant interposes the same objection. Objection sustained.)

Q Did I ask you yesterday how you brought Johnson out of there—did you tell the jury about the journey out from there?

A Not that I remember.

Q Now, after Johnson was injured, what did you see of him?

A The first I met him after the explosion was, when I came from mile 119, was when I stopped over from the hospital to talk with him and look at him and then nearly every day, or every other day, we were down there to see them and get our mail.

Q And then what did you do finally with him?

A He came up to the camp and said he thought it was best to get home because he didn't—

Q Just tell what you did.

A He wanted to go home, and I says—

Q Don't tell what was said, tell us what you did and what took place and all that?

A I told him to go home and we—I took him down.

Q When did you take him; when did you start with him?

A On the 19th, I think, of July.

Q And what was his condition then, as to whether he was able to walk or not?

A He could not walk except a little on two crutches—he had to be helped along.

Q And you brought him out to Tiekill?

A Yes.

Q You came on the boat?

A Yes.

Q And from Tiekill down to Cordova?

A Yes.

Q And from there on down to Seattle?

A Yes.

Q And you went home with him to his home in Roslyn?

A No sir. I stayed here in Seattle. I saw him on the train.

Q You saw him on the train and then he went home by himself?

A Yes.

Q What assistance or help did he require in going out?

A He required help to dress himself and to walk around, except on a level floor.

CROSS-EXAMINATION.

Q (Mr. Graves) You went up to Cordova and from Cordova to Tiekill with Mr. Johnson.

A Yes.

Q You and the other Johnson and Carson, you all went together?

A Yes.

Q You live in Seattle now, Johnson?

A Yes.

Q You didn't come down here from Roslyn for the purpose of testifying in this case?

A No sir.

Q You stopped at 119 to work, did you?

A Yes.

Q Stayed there until after Johnson got hurt?

A Yes.

Q How many days after he got hurt was it you went up there?

A A couple of days.

Q Where did you go to work when you got there?

A Mile 123.

Q In the tunnel?

A Yes.

FRED JOHNSON, recalled on behalf of plaintiff, testifies as follows:

Q (Mr. Lund) You told us yesterday, Mr. Johnson, that you were within a few feet of the hole when it exploded?

A Yes.

Q Now after that explosion occurred, what did you do?

A After that explosion?

Q Yes, after the explosion?

A After the explosion I went in back again.

Q Went in back again?

A Yes, after the smoke and after the muck.

Q After they got the men out?

A Yes.

Q You went back in again?

A Yes, but I could not tell very well, but I was there after they got the men out.

Q And what did you see or notice in the muck?

A I picked up about eight or ten sticks, I can't say exactly—of powder.

Q Of dynamite?

A Yes.

Q Where had those sticks of dynamite come from, if you know?

A They was left in the box.

Q From which the men were loading the hole?

A Yes, where they were loading the hole, they were left in the box.

Q What was the appearance of those sticks, as to whether they were the same that you saw that were in the box when they brought the box in?

A Yes, I saw the box when they brought them in.

Q How long did you work in the tunnel after that?

A I was there until the 18th of May.

Q Till what time?

A 18th of July, I should say.

Q You worked there then for about six weeks.

A Yes.

Q How far in was the tunnel when you quit work—or how far was it when you commenced work?

A About twenty-five or thirty feet.

Q How far was it in when you quit work?

A About one hundred feet.

Q How was the tunnel lighted when you went to work?

A The same as other tunnels.

Q Well how—what were the lights—what kind of lights?

A What kind of lights we had?

Q Yes.

A We had daylight there then.

Q You had daylight there then?

A Yes sir.

Q Just what light came in through the mouth of the tunnel?

A Yes sir.

Q You had no lamps or electric lights or anything of that kind?

A No sir.

Q You used no torches?

A Not in the daytime.

Q What color was the wrappers on this powder?

A It was spotted.

Q What color—yellow, white, red or black?

A Red, black, blue and yellow.

Q Different colors?

A Different colors.

(Witness excused.)

DR. A. O. LOWE testified that he is a physician and surgeon residing in Seattle; that he professionally treated the plaintiff in the fall of 1910, making an X-ray plate of the injury, but the plate has been destroyed; that at the time of his treatment he examined plaintiff's foot.

He further testified as follows:

“Q (Mr. Lund) What did you find the condition of his foot to be?

A I found the bones considerably jammed together and considerable scar tissue on the foot and one bone overlapping another somewhat, and those several conditions resulted in making an abnormal foot, and it had lost most of its elasticity,

due to the scarred tissue and the bones being jammed together and uniting in that condition.

Q And you have examined him again now?

A Yes.

Q And what do you find his condition to be now?

A I find the foot is very much smaller than the other and non-elastic—it hasn't the elasticity of a normal foot—due to the adhesions and the scab and he complains of it being tender on pressure, and the arch is somewhat flattened—it hasn't the arch of the other foot—it hasn't the same instep as the normal foot.

Q Whether or not there are any bones missing from the foot now—did you particularly examine the two toes on the outside?

A I did not examine them as to that, no sir.

Q What can you say, in your opinion, the result of that injury is going to be to Mr. Johnson, assuming that he is a laboring man?

A Well, that foot will certainly not stand the work that the other will, and it probably will be more or less painful after heavy strains and heavy work.

Q Would you consider that a man in his condition as he is today is capable of doing a day's work as a laborer?

A He would not be able to do the work he would with a normal foot.

Q He would not be able to hold a position as an ordinary laborer for any length of time with that foot?

A The probabilities are he would not.

Q For how long a time is that injury going to last, Doctor?

A I doubt if there will be much improvement over the present condition."

SAMUEL MURCHISON, recalled, testified as follows:

"Q (Mr. Lund) As I remember, Mr. Murchison, you were the superintendent in charge for Mr. Heney up there?

A Yes, I was.

Q At this time, in the spring of 1910, where was Mr. Heney?

A In California.

Q You represented Mr. Heney?

A Yes.

Q And I think I asked you, but I am not sure and I will ask you now again, for what concern was Heney constructing the road?

A For the Katalla Company.

Q And you remember station 123?

A Mile 123?

Q That was out from Tiekill how far?

A Twenty-three miles, or twenty-two miles.

Q That was part of the road that Heney was constructing for the Katalla Company?

A Yes.

Q And when was that work on station 123 commenced?

A In January of that year—January or February of that year.

Q And when was the supply of powder or dynamite or explosives sent in there?

A I believe we began freighting up there about the last of January.

Q I will ask you if you didn't make the statement, to refresh your memory, that that dynamite was sent up in April—didn't you make that statement?

A Which dynamite?

Q The dynamite that was used at station 123.

A Well, yes, we sent some up in April and some in March and some in February.

Q And that which you sent to station 123—

A During those months we supplied powder to them at those different times.

Q Is it not a fact that that tunnel work had not been going on or commenced about the first of April that year?

A It began before that, if my memory serves me right.

Q Where did you get the explosives that you sent in there?

A We got them from The Katalla Company.

Q Where?

A At Tiekill.

Q How did you send them in?

A With teams.

Q And how long were they in your possession?

A While they were in transit from Tiekill to the different work along the line.

Q From Tiekill to 123 is how far?

A About twenty-two miles.

Q Twenty-two miles?

A About.

Q How long would the explosives be in your possession while they were being transported that distance?

A Probably about five or six hours or eight hours sometimes.

Q And while they were in your possession were they exposed in any way to the weather or any conditions which would tend to render them dangerous?

A I think not.

Q I asked you yesterday if you knew whether there was anything wrong with the dynamite when you took it and sent it in. I will ask you now if you know now how old it was?

A No.

Q You got it, as I understand, at Tiekill, from the Katalla Company?

A Yes."

Q Are you acquainted with Mr. Wingate?

A We had a man up there, a resident engineer of that name.

Q Was he in charge of station, or section, or mile 123?

A I believe that was his residency or part of it.

Q In whose employ was he?

A I believe he was in the employ of the Katalla Company.

Q Was he one of Heney's men?

A No.

Q What was his business up there?

A To give grades, lines, levels, and superintend the work, to a certain extent, for the Katalla Company.

Q That was what he was doing there—now there is a contract—was this work done under a written contract or by verbal contract, do you know?

A Which work?

Q All the work that Heney did up there.

A So far as I know, it was done under a contract.

Q A written contract, you mean?

A Yes, as far as I know.

Q Did you see it?

A No; I saw a copy.

Q You have seen this copy that I hold here (showing)?

A I don't know that I saw that copy.

Q Where was the copy?

A On the work.

Q On the work?

A Yes, at our office at Tiekill.

Q And that is the copy you went by?

A Yes.

Q That is the contract that was carried out by you?

A Yes, so far as I know.

Q And by Mr. Heney at that time?

A Yes, so far as I know.

Q And the provisions in that copy as you had it up there was carried out by you and Mr. Heney?

A Well, pretty closely, I think.

Q Now, I will ask you, Mr. Murchison, if this provision was carried out there—

My purpose and object of this, your Honor, is to go through the copy which I have and show by the witnesses—by this witness and other witnesses—that the conditions and provisions and agreements that are contained in this copy were the provisions that were carried out and lived up to by both parties to this contract.

I will ask, you, Mr. Murchison, if the work was not to be constructed in a substantial and workmanlike manner to the satisfaction of the chief engineer?

MR. GRAVES: Why not just pass the contract to him and let him see it.

MR. LUND: I prefer to do it my own way, Mr. Graves.

THE COURT: I see no reason of prolonging the inquiry on these immaterial points.

Q (Mr. Lund) Take and look at that copy and look over it, Mr. Murchison, and tell the jury whether that is identically the same as the copy which you had on the work and by which you were doing the work?

A Before I could say that I would have to have our other copy. I could not recall it from memory.

Q You could not, from memory now, say whether that is an accurate copy or not?

A No, I could not say. Before I could say that is an accurate copy I would have to compare this with the one that we had.

Q I asked you yesterday if you knew whether there was anything wrong with the dyanmite when you took it and sent it in. I will ask you now if you know now how old it was?

A No.

Q You got it, as I understand, at Tiekill from the Katalla Company?

A Yes.

MR. LUND: That's all.

MR. GRAVES: That's all.

(Witness excused.)

J. H. YOUNG testified as follows:

Q (Mr. Lund) You live in Seattle?

A Yes.

Q Engaged in what work?

A I am president of the Alaska Steamship Company.

Q And do you remember having a conference with Mr. McCord some few weeks or months ago in reference to the contract between Mr. Heney and the Katalla Company as to the construction of the Copper River Road?

A Yes.

Q Where did that conference take place?

A In my office.

Q Whom did you represent?

A The Copper River & Northwestern Railroad.

Q Was that contract between Heney and the Copper River & Northwestern Railroad?

A No sir.

Q I will show you a paper here marked "Exhibit A refused" and I will ask you if you have ever seen that before? (showing).

A I don't know that I ever saw this copy before. Not that I know of.

Q Have you seen the original of that?

A No sir, I never saw the original.

Q You never saw the original contract between the Katalla Company and Heney for the construction of that road?

A No sir.

Q Now, the conference between you and McCord was in reference to that contract, wasn't it?

A Yes.

Q Is the Copper River & Northwestern Railway Company a party to that contract?

A As I understand it, no; I don't think it is—it was not—it doesn't say so.

Q It is not a party to that contract?

A No sir.

Q Had you had any connections with the Katalla Company at any time?

A Not officially, no sir.

Q Not officially?

A No sir.

Q What was the matter, or the substance of the matter considered by you and Mr. McCord—was it in reference to that contract—wasn't it?

A Yes.

Q Now, tell us how the Copper River & Northwestern Railroad came to have any interest in that contract which they are not a party to?

A The Copper River & Northwestern Railroad engaged the Katalla Company to build a railroad for it, upon which it was to pay so much money on the cost of that road—they were to pay the cost and a certain percentage for the building of that railroad. Charges are entered into there by Heney, the contractor, which would finally revert to the Copper River & Northwestern Railroad Company, if allowed, and I was, partly as representative of the Copper River Railroad, negotiating with Mr. McCord as to the outcome of those charges—as to how those charges should be assessed.

Q And you had no instructions and had no previous con-

ference with any of the officers of the Katalla Company in reference to the matter?

A No sir.

Q The Katalla Company—

A (Continuing) —I will modify that. I would like to modify that, if the Court please. I had a talk with Mr. Hawkins, who was the chief engineer of the Katalla Company.

Q And he is so now?

A No sir, not now.

Q Has the Katalla Company got any officers here in the city now?

A None that I know of, excepting an assistant secretary and treasurer.

Q And who is he?

A Mr. McMasters.

Q (By a Juror) Do I understand that you did not represent the Katalla Company in any sense at that conference?

A No sir.

FRED JOHNSON, recalled, testifies as follows:

Q (Mr. Lund) You told us yesterday, Mr. Johnson, that you were within a few feet of the hole when it exploded.

A Yes.

Q Now after that explosion occurred, what did you do?

A After that explosion?

Q Yes, after the explosion?

A After the explosion I went in back again.

Q Went in back again?

A Yes, after the smoke and after muck.

Q After they got the men out?

A Yes.

Q You went back in again?

A Yes, but I could not tell very well, but I was there after they got the men out.

Q And what did you see or notice in the muck?

A I picked up about eight or ten sticks, I can't say exactly—of powder.

Q Of dynamite?

A Yes.

Q Where had those sticks of dynamite come from, if you know?

A They was left in the box.

Q From which the men were loading the hole?

A Yes, where they were loading the hole, they were left in the box.

Q What was the appearance of those sticks, as to whether they were the same that you say that were in the box when they brought the box in?

A Yes, I saw the box when they brought them in.

Q Were those sticks which you picked up of the same nature?

A They were the same nature.

Q The same kind?

A Yes.

Q How did they correspond with the sticks of dynamite that were in the powder-house?

A I never was in the powder-house.

Q Afterwards?

A No, I never was in the powder-house.

Q You never was in the powder-house?

A No.

Q How did the sticks of powder that you picked up in the dirt there in the tunnel correspond with the powder that they were using there?

A They were the same color on them.

Q (Mr. Graves) Were you the man that went back there and carried out Johnson?

A I was partner with Johnson.

Q You went and carried him out that time, didn't you?

A I carried him out.

MR. GRAVES: That's all.

Q (Mr. Lund) I don't know whether I understand the witness—did you carry Johnson, the man that was hurt, John P. Johnson, did you carry him out of the tunnel after he was hurt?

A No.

Q What do you mean by "carrying Johnson"?

A I don't look—I was looking at my feet.

Q What did you think that Mr. Graves asked you about—what do you think that he asked you about now?

A About the powder.

MR. GRAVES: You thought I asked you if you carried the powder out?

MR. LUND: Is that what you mean—you carried the powder out?

A Yes, I carried the powder out.

(Witness excused.)

JOHN P. JOHNSON, recalled on behalf of plaintiff, testifies as follows:

Q (Mr. Lund) I think I forgot to ask you yesterday how old you are?

A Seventy-three.

THE COURT: Born in '73?

A Yes.

Q (By Mr. Lund) How old are you?

A Born in '73.

Q Are you a man of family?

A Yes, I have five kids—children.

MR. LUND: That is all.

(Witness excused.)

MR. LUND: With the admission of the mortality tables, which I believe this Court takes judicial notice of—if it doesn't I will produce them before we close the trial. The plaintiff rests.

MR. GRAVES: The defendant rests.

Both parties thereupon rested.

Be it further remembered that during the testimony of the witness I. F. Laucks the defendant by its counsel duly objected to the witness being permitted to testify in answer to the following question, upon the grounds that said question

was incompetent and not a proper hypothetical question, to-wit: "Q. Assume as a fact that some men are working in the tunnel on railroad construction, and a box of dynamite is brought into the tunnel with the sticks to be used in loading the hole, and two men are loading it, one man is cutting open the wrappers and the other is shoving the powder down into the hole with the loading stick consisting of wood in the ordinary manner of loading dynamite, and while in the act of doing so an explosion is caused by the dynamite in the hole, the dynamite that is used in loading it being more than two years old, that the wrappers are moist, with an oily moisture, discolored; what would you say was the cause of that explosion?" which objection was by the court overruled and the defendant by its counsel then and there duly excepted to said ruling, which exception was by the court allowed.

Be it further remembered that after all the evidence and testimony was in and after both parties had rested, defendant by its counsel then and there duly challenged the sufficiency of the evidence to sustain or warrant a verdict in favor of the plaintiff and moved the court to direct a verdict of the jury in favor of the defendant upon the ground that the testimony was insufficient to entitle plaintiff to recover; which challenge and motion were by the court overruled and denied, to which ruling the defendant by its counsel, then and there duly excepted, which exception was by the court allowed.

Be it further remembered that the following is the full and complete charge given by the court to the jury upon the trial of said cause; that no charge or instructions were given by the court to said jury upon said trial other than as follows, to-wit:

"INSTRUCTIONS BY THE COURT TO THE JURY.

THE COURT: Gentlemen of the Jury: In the month of May, 1910, the plaintiff was engaged as one of the workmen in the construction of a tunnel, the excavation of a certain space in a hillside, at a point that has been described, in the District of Alaska. While he was so engaged it appears that he met with an injury, and the question which we are here to

investigate is whether the facts and circumstances and the causes leading up to this occurrence were such that under the law of the land he was entitled to recover compensation for those injuries from this defendant, The Katalla Company.

The plaintiff alleges as the foundation for his claim against the defendant company that at that time while he was employed as a laborer on the construction of a certain railroad in connection with which this tunnel or excavation was being prosecuted, the railroad known as the Copper River & Northwestern Railroad, near Copper River, Alaska, that the defendant company was engaged in that construction work in connection with which he was employed. He further alleges that the defendant, The Katalla Company, negligently and carelessly furnished men working with the plaintiff and in his immediate neighborhood dangerous, unsafe, defective and extra-hazardous dynamite for use by them in blasting, in this, to-wit: That the dynamite so furnished was more than two years old and by reason thereof unsafe to use and liable to explode prematurely, though handled ever so carefully; that the dynamite so furnished by the defendant had further been exposed to the air, wind, rain and sun, heat and cold before it was given to the men for use, thereby rendering it extra dangerous, unsafe, easy and liable to explode prematurely though handled carefully, that the age of the dynamite and its extra dangerous condition was well known to the defendant but unknown to the plaintiff; that the dynamite had been exposed to the elements, and its extra dangerous condition by reason thereof was well known to the defendant but unknown to the plaintiff; that the defendant negligently and carelessly failed and neglected to inform the plaintiff and the men using the dynamite of the extra dangerous condition of the same. He further alleges with more circumstance and detail the occurrences which gave rise, as he contends, to the explosion and the injury which he received, and he alleges that the defective condition of the dynamite was the cause of the explosion and the consequent injury; that this conduct on the part of the defendant company constituted negligence and that he is entitled by reason of that negligence to recover compensation.

The defendant denies all of the allegations of negligence;

denies that any of these matters occurred, except that it admits that the plaintiff was laboring there and that he met with an injury, but it denies that it was negligent in any respect and denies that any of its acts caused the injury or the explosion.

It is not claimed by the plaintiff that he was employed by the defendant. It is claimed by him, however, that the relation existing between the plaintiff and the defendant was such that there was a duty owed to him in connection with the nature of the dynamite to be supplied for this use. As to that I will speak more definitely a little later.

Now, the basis of this action is negligence, and so it is important in the first place to understand the definition of negligence. Negligence consists in doing something which under the existing circumstances and conditions a person of ordinary prudence would not have done or, on the other hand, omitting to do something which under existing circumstances and conditions a person of ordinary prudence and care would have done. Now this is the legal definition of negligence. You cannot add to that definition nor subtract from it, but it is for you to take that definition and apply it to the facts and circumstances of each case and to say whether or not there was negligence under that definition.

The opposite of negligence is ordinary care. If a person exercises ordinary care, that is the degree of care that under the circumstances is usually practiced by persons of ordinary prudence, then there is no negligence.

It, of course, follows from this definition that what is or is not negligence depends very largely upon the circumstances—the surrounding conditions. What might be a very proper degree of care under one set of circumstances would be negligence under another set, and it is largely for that reason that you are left to be the judges of whether or not there was any negligence under the circumstances of each case.

Now the plaintiff contends, and there is evidence here tending to establish these facts—whether they are established or not is for you to say, you being entirely the judge of the facts—but there is evidence tending to show that the railroad upon which this construction work was going on was known as the Copper River & Northwestern Railroad. That the company

who owned the railroad, and owning it, made a general contract with the Katalla Company, the defendant in this case for the prosecution of that work. That the Katalla Company had made another general contract with M. J. Heney for the doing of the work; that Heney let out station work, as it has been called in the evidence, that is, certain rather small portions of the work to different parties, and that the plaintiff was employed by one of those parties to work upon this particular tunnel. Further, that the dynamite which was used in the blasting in this particular tunnel came from the defendant, the Katalla Company. Now, there is no evidence as to under just what arrangement the Katalla Company issued this dynamite which came into the possession of Heney and was carried to this location—whether it was furnished because it was a part of the contract that it should be furnished or whether it was sold, we do not know—the evidence does not show. It is the law, however, that if the owner of a railroad, engaged in constructing that railroad, lets out a general contract for the construction of the road and knowing that that contract has been let and that large numbers of men are to be employed or have been employed in the actual work of construction, furnishes an explosive to be used by the individuals who are to actually do the definite construction work, it is the duty of the owner of the railroad furnishing that explosive under those circumstances, to exercise ordinary care to see that the explosive furnished is not unnecessarily dangerous. That is, if the facts are as contended for by the plaintiff, along the lines that I have just mentioned, it was the duty of the defendant company to act with ordinary prudence to see that the dynamite which it furnished and which was to be actually used in the blasting of such excavations should not be defective so as to be extra hazardous and unnecessarily dangerous. If the defendant company used ordinary care to that end, within the definition that I have given to you, then it discharged its duty and no matter how many accidents might occur from the use of the dynamite there would be no liability.

Now, of course, the condition of the dynamite at the time that it left the custody of the defendant company would be an important question. If the dynamite at the time it left the

possession of the defendant—meaning the defendant's own agents, and not meaning Heney and the other contractors and sub-contractors—if when the dynamite left the possession of the defendant company and its immediate employees who delivered possession of the dynamite to Heney or to the others—if at that time it was in an ordinary condition, if it was free from such defects that it was not of an extra hazardous and unnecessarily dangerous character, then, of course, there would be no liability. Further than that, even if it were at that time in a defective and extra hazardous condition, unless that defective and extra hazardous condition was known to the defendant company or its servants and agents acting for it, or by the exercise of ordinary care upon their part they should have known that there was a defective condition which would have been observed by them by using ordinary care, then there would be no liability. In other words, it must appear that the dynamite was defective and further that the defendant failed to exercise ordinary care in putting forth this dynamite under the circumstances that existed. It might be that there might be defects in an article of such a character that the exercise of ordinary care would not discover them—if that was the situation, then it would not be negligence to put them out.

Now, in order to recover the plaintiff must show by the preponderance of the evidence that the defendant was negligent in the points to which I have already referred. It must further appear by a preponderance of the evidence that that negligence was the proximate cause of the injury to the plaintiff.

Now, there is a controversy in the case as to what was the cause of the explosion. The defendant would not be liable for the acts of the man who loaded the dynamite into the hole that has been described in the evidence. Neither would it be responsible for any of the acts of Heney or of his employees, and in order to find for the plaintiff, in addition to the other circumstances that I have referred to—the other points—you must find that the explosion was the proximate result—or to state it differently—you must find that the defect in the dynamite was the proximate cause of the explosion and that the explosion was the cause of the injury to the plaintiff. If the explosion was caused by some unusual formation in the hole

or if it was caused by the negligence of the men who put the dynamite into the hole, then the defendant would not be liable.

At the time of the accident mentioned in the complaint M. J. Heney had a contract for the construction of the line of railway, including the point at which the plaintiff was working. The work at this main point had been sub-let to certain sub-contractors or stationmen, and the plaintiff was in the employ of such stationmen. There is no evidence in this case that the plaintiff was in any manner employed by the Katalla Company or that the Katalla Company owed him any duty by virtue of any employment or contract between the Katalla Company and the plaintiff, or by virtue of any contract of the company with M. J. Heney or the stationmen aforesaid, and you will determine this case with this understanding of the facts, namely; that the Katalla Company had made no contract with the plaintiff nor any person by whom the plaintiff was employed which would render the defendant liable to the plaintiff by reason of such contract. This is not intended to qualify what I have already said, that if there was a general contract for the construction of the road and the defendant company, having made that contract, had knowledge of it, then when it furnished the dynamite to be used in the construction of the road, it would be subject to the obligation to use ordinary care, as I have already stated to you.

It was the duty of M. J. Heney and his sub-contractors in furnishing explosives for use on the work to make reasonable inquiry as to the condition of the explosives and reasonable inspection to determine their safety, and the defendant in this case cannot be held liable by reason of the failure of the said contractor and sub-contractors to perform their duty in these regards. If the Katalla Company furnished Heney with safe explosives and the same afterwards so deteriorated as to become dangerous, then the defendant is not liable for any damage caused by any defect in the explosives.

The only charge of negligence against the defendant in this case is that it furnished a dangerous and unsafe explosive and failed to inform the plaintiff and his fellows of its dangerous character and that the accident to plaintiff was caused by such negligent acts. Before the plaintiff is entitled to recover it

must appear to you from the evidence that the explosion in question was caused by the defective character of the dynamite employed. This fact you cannot find by mere guess or conjecture, but it must appear to you from the evidence. The mere unexplained happening of a premature explosion is not of itself sufficient to establish the defective character of the dynamite employed, but the evidence must go farther and show that the explosion occurred because of some defect in the character of the dynamite which is disclosed to you by the evidence. If the accident may have happened from several different causes for some of which the defendant is liable and for others it is not, you are not to surmise and guess as to which cause might have produced the result, as the defendant can in no event be liable in this action except on account of the explosion occurring through the particular negligence charged, and, as I have heretofore charged you, these facts must not be left to conjecture but must be found from the evidence.

When I speak of a fact found from the evidence I mean not only those things that are directly testified to and that you believe a witness to state truthfully, but I mean also such conclusions as reasonable men would draw from those facts. It is the province of the jury to draw inferences from the facts that have been proven in the case and if the inference is such that a reasonable man would draw it in your judgment you are authorized to draw such an inference.

You are the sole judges of the facts and the evidence in the case. You should consider and give weight to the testimony of all the witnesses. But in weighing the evidence you are not compelled or required to take the testimony of any witness as the truth merely because it has been sworn to, but you must consider their manner of testifying, their demeanor, their apparent interest, or lack of interest, in the case and all other facts and circumstances appearing on the trial, and give to the testimony of each witness such weight only as you deem it to be entitled to receive.

If you find for the plaintiff you will come to the question of damages. Now, in a case of this kind, the law does not undertake to lay down any definite mathematical rule for awarding damages. It is to be borne in mind that the damages re-

coverable in such a case are limited to compensation for the actual damages received, and the award of damages should be compensation, and only compensation for such injuries. The amount of an award is left largely to the good sense and sound judgment of the jury. You have a right to take into consideration the pain and suffering that the plaintiff has endured; any financial loss from his lack of earning capacity that has occurred, and if it appears from the evidence reasonably certain that he will in future suffer pain or that he will suffer a lack of earning capacity, you should take those facts also into consideration in fixing the amount of your award.

You are the judges of all the questions of fact in the case and the weight of the evidence and the credibility of the witnesses. You will pay no attention to the fact that the court has denied a motion in the case or made other rulings on points of law, so far as concerns your decision upon the facts. Such evidence as has been admitted in the case and that only you are to consider. You are responsible for a correct and rightful decision of the case, as the judges of the facts.

The burden of proof is upon the plaintiff to establish the allegations of his complaint by a preponderance of the evidence. By a preponderance of the evidence is meant evidence that has greater convincing force—great probability in your mind. In passing upon these questions of fact you will pass upon them without regard to any sympathy of prejudice—simply as the investigators of those questions. It is for you to say, regardless of any feeling one way or the other as between these parties, just what the facts were within the rules of law that I have stated.

You will have two forms of verdict, which you will readily understand. In order to agree upon a verdict, the concurrence of the entire eleven composing your body is necessary.

Now, the court may not be in session when you agree upon a verdict. If that is the case you may return a sealed verdict. In that case, at the conclusion of your deliberations the foreman signs the verdict which you have agreed upon and puts it in a sealed envelope, keeping it in his possession; you can then separate, but you will be in your seats tomorrow morning

at ten o'clock, when the verdict will be opened and read. You may now retire."

Be it further remembered that, at the time of giving said instructions, defendant by its counsel then and there duly excepted to the following instruction given by the court, which exception was by the court allowed, to-wit:

"Now, there is no evidence as to under just what arrangement the Katalla Company issued this dynamite which came into the possession of Heney and was carried to this location, whether it was furnished because it was a part of the contract that it should be furnished or whether it was sold, we do not know—the evidence does not show. It is the law, however, that if the owner of a railroad engaged in constructing that railroad lets out a general contract for the construction of the road and knowing that that contract has been let and that large numbers of men are to be employed or have been employed in the actual work of construction, furnishes an explosive to be used by the individuals who are to actually do the definite construction of the work, it is the duty of the owner of the railroad furnishing that explosive under those circumstances to exercise ordinary care to see that the explosive furnished is not unnecessarily dangerous."

The court further instructed the jury as a modification of defendant's requested instruction No. 1, as follows:

"This is not intended to qualify what I have already said, that if there was a general contract for the construction of the road and the defendant company having made that contract had knowledge of it, then when it furnished the dynamite to be used in the construction of the road it would be subject to the obligation to use ordinary care, as I have already stated to you."

To the giving of which instruction, and to the modification of its requested instruction No. 1, the defendant by its counsel then and there duly excepted, which exception was by the court allowed.

That defendant's requested instruction No. 1, before being modified as last aforesaid, was as follows:

“That at the time of the accident mentioned in the complaint one M. J. Heney had a contract for the construction of a certain line of railway, including the point at which the plaintiff was working. The work at this named point had been sub-let to certain sub-contractors or stationmen, and the plaintiff was in the employ of such stationmen. There is no evidence in this case that the plaintiff was in any manner employed by the Katalla Company, or that the Katalla Company owed him any duty by virtue of any employment or contract between said company and the plaintiff, or by virtue of any contract of the company with M. J. Heney or the stationmen aforesaid, and you will determine this case with this understanding of the facts, viz: that the Katalla Company has made no contract with the plaintiff or any person by whom the plaintiff was employed which would render the defendant liable to the plaintiff by reason of such contract.”

That the defendant duly requested the court in writing to give its requested instruction No. 2 as follows:

“I charge you that it was the duty of M. J. Heney and his sub-contractors in furnishing explosives for use on the work to make a reasonable inquiry as to the condition of the explosives and a reasonable inspection to determine their safety, and that the defendant in this case cannot be held liable by reason of the failure of said contractor and sub-contractors to perform their duty in these regards. If the Katalla Company furnished Heney with safe explosives and the same afterwards so deteriorated as to become dangerous then the defendant is not liable for any damage caused by any defect in the explosive; and if the Katalla Company furnished unsafe explosives to said contractor and the contractor knew the unsafe character of such explosive, or by reasonable inspection could have determined its character and with such knowledge or opportunity of knowledge said contractor purchased from the Katalla Company such explosives, and an accident occurred in the use of the same, then the Katalla Company would not be liable, but the direct and proximate cause of such an accident would be the act of the contractor in using or furnishing for use such unsafe explosive.”

And which instruction the court refused to give as requested, but modified the same by striking therefrom the following portion: "And if the Katalla Company furnished unsafe explosives to said contractor and the contractor knew the unsafe character of such explosive or by reasonable inspection could have determined its character and with such knowledge or opportunity of knowledge said contractor purchased from the Katalla Company such explosives and an accident occurred in the use of the same, then the Katalla Company would not be liable, but the direct and proximate cause of such an accident would be the act of the contractor in using or furnishing for use such unsafe explosive," and to which refusal to give said last mentioned portion of said instruction the defendant by its counsel then and there duly excepted, which exception was by the court allowed.

Be it further remembered that thereafter defendant duly and regularly filed its petition for new trial, which petition was by the court denied and overruled upon condition that the plaintiff remit all of the verdict and judgment in excess of five thousand seven hundred dollars, and the plaintiff thereafter duly in writing consented that the verdict of the jury be reduced to the sum of five thousand seven hundred dollars, and judgment was thereupon rendered in favor of the plaintiff and against the defendant for the said sum of five thousand seven hundred dollars. To the order of the court overruling and denying defendant's petition for a new trial, the defendant by its counsel excepted, and such exception was allowed.

Service of within and foregoing Bill of Exceptions acknowledged, and copy received this 18th day of April, 1912.

MARTIN J. LUND,
Attorney for Plaintiff.

*In the United States District Court, Western District of Wash-
ington, Northern Division.*

JOHN P. JOHNSON,	} Plaintiff,	No. 1940.
vs.		
THE KATALLA COMPANY,		
	Defendant.	

CERTIFICATE TO BILL OF EXCEPTIONS.

I, C. H. HANFORD, Judge of the above entitled court, do hereby CERTIFY that the above and foregoing bill of exceptions in the above entitled cause, is a true bill of exceptions, and the same has been approved, allowed and settled, and ordered filed and made a part of the record of said cause.

Done in open court this 16th day of May, 1912.

C. H. HANFORD, Judge.

Indorsed: Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, May 16, 1912. A. W. Engle, Clerk. By S., Deputy.

In the United States District Court, Western District of Washington, Northern Division.

JOHN P. JOHNSON,	} No. 1940.
<i>Plaintiff,</i>	
vs.	
THE KATALLA COMPANY,	}
<i>Defendant.</i>	

ORDER ALLOWING, SETTLING AND CERTIFYING BILL
OF EXCEPTIONS.

It appearing to the Court that the defendant has prepared and duly served upon the attorneys for the plaintiff herein, within due time, a proposed bill of exceptions, and the plaintiff, within ten days thereafter, having served the defendant with proposed amendments to the proposed bill, and said proposed bill of exceptions and proposed amendments thereto, within five days thereafter, having been delivered to the Clerk of the above entitled Court for the Judge thereof, and the said Clerk having delivered said proposed bill and amendments to the said Judge, and the Judge of said Court having duly designated Monday, the 6th day of May, 1912, as the time at which he would settle the bill of exceptions, and the said Clerk of said Court having at once notified and informed both parties of the time for settling the bill of exceptions as designated by the Judge, and the said matter coming regularly on for hearing for the purpose of settling the said bill of exceptions on the said 6th day of May, 1912,

It was thereupon, and is hereby ordered that the proposed amendments to said proposed bill of exceptions be allowed, and that with the addition of said proposed amendments to said proposed bill, the same shall be and is hereby settled and allowed as a bill of exceptions herein, and the same shall be engrossed by the defendant and presented to the Judge of this Court for his certificate.

And it further appearing to the Court that said proposed bill of exceptions with the proposed amendments have been engrossed, and that said bill of exceptions so engrossed conforms to the truth and is in proper form, it is therefore ordered that the said bill is a true bill of exceptions, and the same is hereby approved, allowed and settled, and ordered filed and made a part of the record of said cause.

Done in open court this 16th day of May, 1912.

C. H. HANFORD, Judge.

Indorsed: Order Allowing, Settling and Certifying Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, May 16, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the United States District Court for the Western District of
Washington. Northern Division.*

JOHN P. JOHNSON,	} No. 1940.	
vs.		
THE KATALLA COMPANY,		
	<i>Plaintiff,</i>	
	<i>Defendant.</i>	

ASSIGNMENT OF ERRORS.

Comes now the Katalla Company, the defendant above named, in connection with its petition for a writ of error, and makes the following assignment of errors, and particularly specifies the following as the errors upon which it will rely and which it will urge upon the prosecution of its said writ of error in the above entitled cause, and which it avers occurred upon the trial of said case, to-wit:

I.

The Court erred in rendering judgment in favor of the plaintiff and against the defendant.

II.

The Court erred in overruling and denying the defendant's challenge to the sufficiency of the evidence to sustain a verdict in favor of the plaintiff, and in overruling and denying defendant's motion to direct a verdict of the jury in favor of the defendant.

III.

The Court erred in overruling and denying defendant's motion for a new trial.

IV.

The Court erred in permitting plaintiff's witness, I. F. Laucks, to testify in answer to the following question:

“Q Assume as a fact that some men are working in the tunnel on railroad construction, and a box of dynamite is brought into the tunnel with the sticks to be used in loading the hole, and two men are loading it, one man is cutting open the wrappers and the other is shoving the powder down into the hole with the loading stick consisting of wood in the ordinary manner of loading dynamite, and while in the act of doing so an explosion is caused by the dynamite in the hole, the dynamite that is used in loading it being more than two years old, that the wrappers are moist, with an oily moisture, discolored; what would you say was the cause of that explosion?”

V.

The Court erred in giving the following instruction to the jury:

“Now, there is no evidence as to under just what arrangement the Katalla Company issued this dynamite which came into the possession of Heney and was carried to this location, whether it was furnished because it was a part of the contract that it should be furnished or whether it was sold, we do not know—the evidence does not show. It is the law, however, that if the owner of a railroad engaged in constructing that railroad lets out a general contract for the construction of the road and knowing that that contract has been let and that large numbers of men are to be employed or have been employed in the actual work of construction, furnishes an explosive to be used by the individuals who are to actually do the definite construction of the work, it is the duty of the owner of the railroad furnishing that explosive under those circumstances to exercise ordinary care to see that the explosive furnished is not unnecessarily dangerous.”

VI.

The Court erred in modifying defendant's requested instruction No. 1, by giving the following additional instruction:

“This is not intended to qualify what I have already said, that if there was a general contract for the construction of the road and the defendant company having made that contract

had knowledge of it, then when it furnished the dynamite to be used in the construction of the road it would be subject to the obligation to use ordinary care, as I have already stated to you."

VII.

The Court erred in failing and refusing to give that part of defendant's requested instruction No. 2, which reads as follows:

"And if the Katalla Company furnished unsafe explosives to said contractor and the contractor knew the unsafe character of such explosive or by reasonable inspection could have determined its character and with such knowledge or opportunity of knowledge said contractor purchased from the Katalla Company such explosives and an accident occurred in the use of the same, then the Katalla Company would not be liable, but the direct and proximate cause of such an accident would be the act of the contractor in using or furnishing for use such unsafe explosive."

Wherefore, said The Katalla Company, plaintiff in error, prays that said judgment of the District Court of the United States for the Western District of Washington, Northern Division, be reversed, and that said Court be instructed to grant a new trial of said cause.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, May 20, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the United States District Court for the Western District of
Washington. Northern Division.*

JOHN P. JOHNSON,

Plaintiff,

vs.

THE KATALLA COMPANY, a Cor-
poration,

Defendant.

No. 1940.

PETITION FOR WRIT OF ERROR.

Comes now the Katalla Company, a corporation, the defendant herein, and complains and states that on the 12th day of March, 1912, the above entitled court entered judgment herein in favor of the plaintiff above named, and against the defendant above named, in which judgment, and in the proceedings had prior thereto in the above entitled cause, certain errors were committed to the prejudice of this defendant, all of which will appear in detail from the Assignment of Errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record and proceedings, with all things concerning the same, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And defendant further prays for an order fixing the amount of bond for a supersedeas in said cause.

Dated this 17th day of May, A. D. 1912.

BOGLE, GRAVES, MERRITT & BOGLE,

Attorneys for Defendant.

Indorsed: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, May 20, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the United States District Court for the Western District of
Washington. Northern Division.*

JOHN P. JOHNSON,

Plaintiff,

vs.

THE KATALLA COMPANY,

Defendant.

No. 1940.

ORDER ALLOWING WRIT OF ERROR.

On this day came the defendant, the Katalla Company, a corporation, by its attorneys, and filed herein and presented to the Court its petition praying for the allowance of a Writ of Error, and an assignment of errors to be urged by it, praying also that a transcript of the record and proceedings in said cause, with all things concerning the same, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that the amount of bond for supersedeas in said cause be fixed. On consideration whereof, the Court does hereby allow a Writ of Error as prayed for.

IT IS FURTHER ORDERED that a bond in the sum of Twelve Thousand Dollars (\$12,000.00), conditioned according to law, be executed in behalf of the above named defendant, with good and sufficient surety, to be approved by the undersigned judge, and that upon said bond being executed, approved and filed, said judgments in this cause shall forthwith be superseded, and all proceedings in this cause stayed until a final determination of said Writ of Error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 20th day of May, A. D., 1912.

C. H. HANFORD,

District Judge of the United States for the Western District of
Washington.

Indorsed: Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, May 20, 1912.
A. W. Engle, Clerk. By S., Deputy.

*In the District Court of the United States for the Western
District of Washington. Northern Division.*

JOHN P. JOHNSON,

Plaintiff,

VS.

THE KATALLA COMPANY, a Cor-
poration,

Defendant.

No. 1940.

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, That we, the Katalla Company, a corporation, defendant in the above entitled cause of action, as principal, and the American Surety Company, a corporation, duly organized and existing under and by virtue of the laws of the State of New York, and duly authorized and empowered to become surety upon bonds and to transact business as a surety company in the State of Washington, as surety, are held and firmly bound unto John P. Johnson, plaintiff above named, in the sum of Twelve Thousand Dollars (\$12,000.00), lawful money of the United States, to be paid to the said plaintiff, his heirs, executors, administrators and assigns, for which payment, well and truly to be made, we do hereby bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Seattle, Washington, this 20th day of May, A. D. 1912.

Whereas, lately, at a District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in said Court, between John P. Johnson, plaintiff, and Katalla Company, a corporation, defendant, a judgment was rendered in favor of said plaintiff and against said defendant in the sum of five thousand seven hundred dollars (\$5,700.00) and costs, and the said Katalla Company, defendant, having obtained a Writ of Error and filed a copy thereof in

the office of the Clerk of said Court, to reverse the judgment in the aforesaid action, and having obtained a citation directed to the above named plaintiff, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, in said Circuit.

Now, therefore, the condition of the above obligation is such, that if the said Katalla Company shall prosecute its Writ of Error to effect and shall answer all costs and damages that may be awarded against it, including all just damages for delay and costs and interest on the appeal, if it shall fail to make its plea good, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

It is hereby expressly agreed by said surety that in case of a breach of any condition hereof, the above named District Court of the United States for the Western District of Washington, Northern Division, may, upon notice to said surety of not less than ten days, proceed summarily in the above entitled action to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety, and award execution therefor.

KATALLA COMPANY,

By Bogle, Graves, Merritt & Bogle, its Attorneys.

AMERICAN SURETY COMPANY OF NEW YORK,

By H. H. A. Hastings, Resident Vice-President.

Attest:

S. H. Melrose,

(Seal)

Resident Assistant Secy.

The foregoing bond is hereby approved as a bond on a Writ of Error and Supersedeas Bond, this 20th day of May, A. D., 1912.

C. H. HANFORD,

Judge of the District Court of the United States for the Western District of Washington.

Indorsed: Bond on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, May 20, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the United States District Court for the Western District of
Washington. Northern Division.*

JOHN P. JOHNSON,

Plaintiff,

vs.

THE KATALLA COMPANY,

Defendant.

No. 1940.

ACKNOWLEDGMENT OF SERVICE OF PAPERS ON
WRIT OF ERROR.

Service of the Petition for Writ of Error, of the Assignment of Errors, of the Bond on Writ of Error, of the Citation on Writ of Error, and of Writ of Error in the above entitled cause, filed in the above entitled Court on the 20th day of May, 1912, is hereby acknowledged, and receipt of true copies thereof on this 20th day of May, 1912, is also acknowledged.

MARTIN J. LUND,

Attorney for Defendant in Error.

Indorsed: Acknowledgment of Service of Papers on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, May 20, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the United States District Court for the Western District of
Washington. Northern Division.*

JOHN P. JOHNSON, <i>Defendant in Error.</i>	}	No. 1940.
vs.		
THE KATALLA COMPANY, <i>Plaintiff in Error.</i>		

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the above entitled Court:

You will please prepare, certify and transmit forthwith to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, at San Francisco, California, as the record on writ of error to the District Court of the United States for the Western District of Washington, Northern Division, a complete transcript of the following files, record and proceedings in the above entitled cause, to-wit:

Complaint.

Answer.

Reply.

Verdict.

Petition for New Trial.

Order extending time for filing Bill of Exceptions, filed February 19, 1912.

Memorandum Decision and Order on Motion for new trial, filed February 29, 1912.

Order Denying Petition for New Trial, filed March 12, 1912.

Written Consent of Plaintiff to Reduction of Verdict, filed March 12, 1912.

Judgment, filed March 12, 1912.

Order extending time for filing Bill of Exceptions, filed March 26, 1912.

Order extending the time for filing Bill of Exceptions, filed April 8, 1912.

Bill of Exceptions and Certificate, filed May 16, 1912.

Order allowing and settling Bill of Exceptions, filed May 16, 1912.

Assignment of Errors.

Petition for Writ of Error.

Order allowing Writ of Error.

Bond on Writ of Error.

Writ of Error, and copy thereof.

Citation, and copy thereof.

Acceptance of Service of Papers on Writ of Error.

This Praecipe.

Dated May 20, 1912.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Plaintiff in Error.

Indorsed: Praecipe for Transcript of Record. Filed in the
U. S. District Court, Western Dist. of Washington, May 20,
1912. A. W. Engle, Clerk. By S., Deputy.

*In the District Court of the United States for the Western
District of Washington. Northern Division.*

JOHN P. JOHNSON,

Plaintiff,

vs.

THE KATALLA COMPANY, a Cor-
poration,

Defendant.

No. 1940.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,

Western District of Washington.—ss.

I, A. W. Engle, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify the foregoing one hundred and sixty-four printed pages numbered from 1 to 164, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause as is called for by the Praecept of the Attorneys for Defendant and Plaintiff in Error as the same remain of record and on file in the office of the Clerk of the said Court, and that the same constitutes and return to the Writ of Error received and filed in the office of the Clerk of the said District Court on May 20, 1912.

I further certify that I annex hereto and herewith transmit the original Writ of Error and Citation in said cause.

I further certify that the cost of preparing and certifying the foregoing return to Writ of Error is the sum of one hundred, ninety-four dollars, and fifteen cents (\$194.15) and that the said sum has been paid to me by Messrs. Bogle, Graves, Merritt & Bogle, of counsel for Defendant and Plaintiff in Error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 10th day of July, 1912.

(Seal)

A. W. ENGLE, Clerk.

*In the United States District Court for the Western District of
Washington. Northern Division.*

JOHN P. JOHNSON,

Plaintiff,

vs.

THE KATALLA COMPANY,

Defendant.

No. 1940.

WRIT OF ERROR.

UNITED STATES OF AMERICA.

*The President of the United States of America, to the Honorable, the Judges of the District Court of the United States, for the Western District of Washington, Northern Division.
Greeting:*

Because in the record and proceedings, as also in the rendition of the judgment upon a verdict, which is in the said District Court before you, or some of you, between John P. Johnson, the original plaintiff, and the defendant in error, and the Katalla Company, the original defendant and the plaintiff in error, manifest error hath happened to the damage of said the Katalla Company, plaintiff in error, as by its answer appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in San Francisco, in said Circuit, on the 20th day of June next; and that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further

to be done therein to correct that error, which of right and according to law and custom of the United States ought to be done.

Witness the Honorable Edward Douglas White, Chief Justice of the United States, the 20th day of May, in the year of our Lord, One Thousand Nine Hundred and Twelve.

(Seal)

A. W. ENGLE,

Clerk of the District Court of the United States for the Western District of Washington. Northern Division.

By F. A. SIMPKINS, Deputy.

(Seal)

Allowed by :

C. H. HANFORD,

District Judge of the United States, Presiding in the District Court of the United States, for the Western District of Washington. Northern Division.

Received this 20th day of May, 1912, a true copy of the foregoing writ of error for the defendant in error.

A. W. ENGLE,

Clerk of the District Court of the United States for the Western District of Washington. Northern Division.

By F. A. SIMPKINS, Deputy.

Indorsed: No. 1940. Original. In the District Court of the United States, Western District of Washington, Northern Division. John P. Johnson, Plaintiff, vs. the Katalla Company, a corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, May 20, 1912. A. W. Engle, Clerk. By S., Deputy. Bogle, Graves, Merritt & Bogle, 610-616 Central Building, Seattle, Washington, Attorneys for Defendant.

*In the United States District Court for the Western District of
Washington. Northern Division.*

JOHN P. JOHNSON,

Plaintiff,

vs.

THE KATALLA COMPANY,

Defendant.

No. 1940.

CITATION.

UNITED STATES OF AMERICA.

The President of the United States to John P. Johnson.

Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the Court room of said Court in the City of San Francisco, in the State of California, within thirty (30) days after the date of this citation, pursuant to writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein the Katalla Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice not be done to the parties in that behalf.

Witness the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States, the 20th day of May, in the year of our Lord, One Thousand Nine Hundred and Twelve.

C. H. HANFORD,

Judge of the District Court of the United States, Presiding in
the District Court of the United States for the Western
District of Washington, Northern Division.

Copy of the within Citation received and service acknowledged this 20th day of May, 1912.

MARTIN J. LUND,
Attorney for Defendant in Error.

Indorsed: No. 1940. Original. In the District Court of the United States, Western District of Washington, Northern Division. John P. Johnson, Plaintiff, vs. the Katalla Company, Defendant. Citation. Filed in the U. S. District Court, Western District of Washington, May 20, 1912. A. W. Engle, Clerk. By S., Deputy. Bogle, Graves, Merritt & Bogle, 610-616 Central Building, Seattle, Washington, Attorneys for Defendant.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE KATALLA COMPANY, a cor-
poration,

Plaintiff in Error,

vs.

JOHN P. JOHNSON,

Defendant in Error.

No. **2158**

*Error to the United States District Court for the
Western District of Washington,
Northern Division.*

Brief of Plaintiff in Error

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT,
LAWRENCE BOGLE,

Attorneys for Plaintiff in Error.

Seattle, Washington.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE KATALLA COMPANY, a corporation,

Plaintiff in Error,

vs.

JOHN P. JOHNSON,

Defendant in Error.

No.....

*Error to the United States District Court for the
Western District of Washington,
Northern Division.*

Brief of Plaintiff in Error

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Seattle, Washington.

In the
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE KATALLA COMPANY, a corporation,

Plaintiff in Error,
vs.

JOHN P. JOHNSON,

Defendant in Error.

No.

*Error to the United States District Court for the
Western District of Washington,
Northern Division.*

Brief of Plaintiff in Error

STATEMENT.

I.

This was an action at law to recover damages on account of personal injuries sustained by the plaintiff, John P. Johnson, and alleged to have been caused by the negligence of the defendant, The Katalla Company. Defendant's motion for a directed verdict was denied. Judgment was rendered

in favor of plaintiff upon the verdict of a jury. Petition for a new trial was denied, upon the plaintiff consenting to a reduction in the amount of the verdict.

The complaint, in substance, charges that the Katalla Company was engaged in the construction of a railroad in Alaska, and Johnson was employed as a laborer thereon; that the company furnished the men working with Johnson unsafe, defective and extra-hazardous dynamite for use in blasting, and that such dynamite was defective because of its age and exposure to the elements, and by reason thereof liable to explode prematurely, though carefully handled; that, while the dynamite was being used by the men mentioned, it exploded prematurely by reason of its extra-dangerous and unsafe condition, and Johnson received his injuries.

The answer, by denials, placed in issue the facts alleged. No question arises here upon any other fact pleaded.

In order to fix liability upon the plaintiff in error and hold the judgment rendered, defendant in error must maintain four propositions:

1. That the Katalla Company furnished the dynamite to the men working with Johnson, and,

if it was defective, violated some duty it owed to Johnson.

2. That the act of the Company in selling the dynamite to the contractor and builder of the railroad was the proximate and efficient cause of the injury to Johnson.
3. That the dynamite was in a defective or extra-hazardous condition when it left the possession of the Company.
4. That the injury was occasioned by the premature explosion of such defective dynamite, and that the same was so defective as to cause the premature explosion, and that such defective character was created by the age of the explosive and its exposure to the elements.

These four propositions, together with the errors assigned as occurring during the progress of the cause, and presently noted, are the matters to be reviewed upon the instant writ of error.

II.

In the year 1910, one M. J. Heney, as an independent and general contractor, was engaged in the construction of a railroad for the Katalla Company, plaintiff in error. This railroad was being

constructed from Cordova, Alaska, into the interior of Alaska, and at "Mile 123" certain tunnel work was being carried on. Under his system of performing his contract, Heney sublet certain portions of the work to sub-contractors or station men, and the sub-contractors employed the labor. One Sam Rollin and associates were the sub-contractors engaged in driving the tunnel at "Mile 123," and the defendant in error, John P. Johnson, and others, were employed there as laborers by the sub-contractors. Heney purchased the dynamite or explosive used on the work from the Katalla Company, and then furnished the same to the sub-contractors, and they stored it, and supplied it on their work from time to time, as needed.

On May 26, 1910, while Johnson was engaged in drilling in the tunnel at "Mile 123," certain of the sub-contractors there were loading dynamite into a hole, and while so engaged an explosion occurred, and Johnson received the injuries of which he complains. This tunnel had been commenced in January, and explosives had been sent out there by Heney during the months of February, March and April, 1910, and had been used in all the work upon this tunnel without disclosing any unusual, dangerous or defective character of the explosive. During

the loading of the hole, the box of explosive was set in front of the hole, and certain sticks of dynamite were placed in the hole, and while they were being rammed into position, the explosion occurred. The box of dynamite sitting in front of the hole was blown and scattered by the force of the explosion over the rocks throughout the tunnel, but none of the dynamite subjected to this unusual force and jar was exploded or discharged. The sole explosion was in the hole into which the sub-contractors were ramming sticks of dynamite from which the wrappings had been cut and removed. It will be noted that the Company was not furnishing explosive to the men employed with Johnson, as alleged in the complaint, and that it occupied no contractual relation or otherwise with Johnson, and that if liable at all it is for the selling of an extra-dangerous explosive, knowing the increased dangers of its use and not disclosing such danger to the purchaser, the purchaser being ignorant of its true character.

It is also worthy of note that there is no evidence showing, or from which it can be inferred, that the dynamite when sold by the Katalla Company to Heney was in any respect dangerous or defective, or that the Katalla Company failed in any regard to properly inspect the explosive, or

showing in what manner the explosive was treated and cared for while in the possession of Heney and the sub-contractors, or when the particular dynamite which exploded was furnished by the Katalla Company; and there was no evidence that the dynamite being used at the time of the accident was defective or extra-hazardous, nor were there any facts proven from which such a fact could be inferred, unless inferred from the single incident of the explosion occurring, and that inference is negatived and overthrown by the circumstance that none of the dynamite exploded when blown about the tunnel, and that the explosion itself occurred in a rock hole into which sticks of dynamite were being rammed. There was testimony that the wrappers on the dynamite used on the day of the accident showed, *at that time*, evidence of being bleached and moist and of having been exposed to the elements, but the record is silent as to whether this condition existed at the time the dynamite left the possession of the Katalla Company. If speculation and conjecture are to be resorted to, notice may be taken of the climatic conditions of southwestern Alaska during the winter and spring months, in which season Heney and his sub-contractors were hauling and holding the dynamite on the work, and the liability to exposure under such conditions.

III.

The questions involved, and which are presented here by the assignments of error, are as follows:

1. The evidence was not sufficient to entitle defendant in error to recover, and the motion of plaintiff in error, made at the close of the evidence, to direct a verdict in its favor, should have been granted.
2. The evidence was insufficient to justify a verdict in favor of defendant in error, and the petition for a new trial should have been granted.
3. Exceptions were taken to the giving and refusal to give certain instructions to the jury, which instructions are hereinafter particularly set forth, and the rulings thereon assigned as error.

SPECIFICATIONS OF ERROR RELIED UPON.

I.

The court erred in denying the motion of plaintiff in error for a directed verdict, and in denying the petition for a new trial, for the reason that the evidence was insufficient to sustain or justify a verdict against it, in the following particulars:

1. That the negligence charged against the defendant was not shown by the evidence.

2. There was no evidence that the explosive which was discharged to the injury of plaintiff was defective or extra hazardous, or was more dangerous to handle than like explosives of the usual composition and of high explosive nature.

3. That there was no evidence that the explosion was caused by reason of any defective or extra dangerous condition of said explosive, but the evidence affirmatively showed that the quality of the explosive was such that it would not discharge prematurely, or from slight jars or rough handling.

4. The evidence did not disclose the cause of the explosion at the time the plaintiff received his injuries, and there was no evidence of facts from

which the jury could draw any inference as to the cause of the explosion, and the finding of the jury was based on mere conjecture and guess.

5. There was no evidence that the explosive was extra dangerous or defective when it was furnished by the defendant, and no evidence was offered regarding its character and condition when it left the possession of defendant, and there was no evidence tending to show that the defendant did not exercise the care in furnishing the explosive to M. J. Heney required by the instructions of the court.

6. The verdict was against the law and the evidence, in this, that the court charged the jury that the only duty of the defendant was to use ordinary care to see that the explosive sold by it was not extra hazardous or unnecessarily dangerous, and there was no evidence to show, or that tended to show, any such lack or care.

7. There was no evidence that any contractual, or other, relation existed between the plaintiff and the defendant which imposed upon the defendant any greater duty than to observe the same degree of ordinary care that one person should observe for the safety of every other person, and there is no evidence of any failure on the part of defendant to observe such ordinary care.

8. The evidence failed to show the terms of the contract between the defendant and M. J. Heney under which the explosive was purchased, and that it appears that Heney and his agent had as full opportunity of knowing the character and condition of such explosive as defendant had, and the evidence wholly fails to show that Heney and his agents did not receive and undertake the use of such explosive with full knowledge of its character and condition, if such explosive was in any respect defective at the time it was delivered by the defendant.

9. The evidence fails to show that the act of defendant in selling the explosive to Heney was the direct and proximate cause of the injury to plaintiff, because, if the explosive was defective, it appears that Heney, his agents and sub-contractors, with full opportunity to inspect and know the character of such explosive, voluntarily assumed to use said explosive and exposed the plaintiff to danger, and such act was the direct and proximate cause of the injury to plaintiff.

II.

The court erred in giving the following instruction to the jury:

“Now, there is no evidence as to under just what arrangement the Katalla Company issued this dynamite which came into the possession of Heney and was carried to this location, whether it was furnished because it was a part of the contract that it should be furnished or whether it was sold, we do not know—the evidence does not show. It is the law, however, that if the owner of a railroad engaged in constructing that railroad lets out a general contract for the construction of the road and knowing that that contract has been let and that large numbers of men are to be employed or have been employed in the actual work of construction, furnishes an explosive to be used by the individuals who are to actually do the definite construction of the work, it is the duty of the owner of the railroad furnishing that explosive under those circumstances to exercise ordinary care to see that the explosive furnished is not unnecessarily dangerous.”

III.

The court erred in modifying defendant's requested instruction No. 1, by giving the following additional instruction:

“This is not intended to qualify what I have already said, that if there was a general contract for the construction of the road and the defendant company having made that contract had knowledge of it, then when it furnished the dynamite to be used in the construction of the road it would be subject to the obligation to use ordinary care, as I have already stated to you.”

IV.

The court erred in failing and refusing to give that part of defendant's requested instruction No. 2, which reads as follows:

“And if the Katalla Company furnished unsafe explosives to said contractor and the contractor knew the unsafe character of such explosive or by reasonable inspection could have determined its character and with such knowledge or opportunity of knowledge said contractor purchased from the Katalla Company such explosives and an accident occurred in the use of the same, then the Katalla Company would not be liable, but the direct and proximate cause of such an accident would be the act of the contractor in using or furnishing for use such unsafe explosive.”

ARGUMENT.

WHAT CAUSED THE PREMATURE EXPLOSION?

This inquiry is not answered in the record. No witness testified to the point and no proven fact establishes the cause of the accident. It is a matter of surmise, conjecture, guess-work.

It is an undisputed fact that M. J. Heney was the general contractor and that Sam Rollin and others were the sub-contractors at the place of accident (Transcript of the Record, pp. 46, 47, 69 and 119). It also appears, without dispute, that Johnson and others were engaged in drilling in the tunnel on the day of accident, when Riley, one of the sub-contractors, with another man, went into the tunnel and commenced to load dynamite into a hole which had been shot, but had not broken out. It is without dispute that the loading was performed by the man cutting away the wrappers which enclosed and protected the dynamite, while Riley pushed the bare dynamite into the rocky hole. All of the witnesses were engaged in the work of drilling and of course only incidentally noticed what was being done by the men loading the hole. The plaintiff admits that he did not know what caused the explo-

sion and that he had not noticed the men who were loading the hole for three or four minutes prior to the explosion. (Transcript of the Record, pp. 37, 64 and 65.) All agree that the explosion occurred in the hole. Two witnesses claim that they, while engaged in their work, from time to time looked in the direction of the men who were doing the loading; but, as in all such cases, they were able to testify to nothing definite except that an explosion occurred. The plaintiff testified on this point as follows:

“Q. Do you know what exploded—where the powder was that exploded?

A. No.

Q. You don't know whether it was in the hole or in the box?

A. No, it was in the hole.

* * * * *

Q. Then your idea is that Riley when he was loading the powder in the hole set it off some way?

A. No, the powder was in the box after the explosion.

Q. How is that?

A. The powder was in the muck—was in the box—the box was mashed to pieces but the powder was in the muck.

(Transcript of Record, p. 57.)

Q. Do you know whether that explosion occur-

red in the hole or occurred in the box of powder that was sitting beside Johnson and Riley?

A. No. I saw after I was on hands and knees and the explosion, the powder was in the muck—some powder was in the muck.

Q. You saw powder in the muck?

A. Yes.

Q. You are sure that powder in the box did not explode?

A. No.

Q. It was the powder in the hole that exploded?

A. Yes.

Q. Then the jar and the throwing of this rock around there did not explode the powder in the loose rock, did it?

A. No—in the hole—it break that hole.

Q. But you say that lying in the muck you saw powder that was not exploded, didn't you?

A. Yes, some powder left.

Q. That is, there was not any powder before Riley came in, in that muck?

A. No.

Q. So that the powder which you saw in the muck was powder that was in the box that Riley brought in there?

A. Yes.

Q. And that powder did not explode?

A. Not in the muck.

Q. What caused it to go over there—what threw

it over into the muck, do you know,—was it the explosion?

A. Yes, the explosion.

Q. The explosion in the face of the tunnel threw this powder in the box over in the muck, did it?

A. Yes, and it break that box.

Q. But it didn't explode that powder in the muck?

A. No."

(Transcript of Record, p. 65.)

It will be noted that the term "muck" used in mining and blasting refers to rock which has been at some time blown out by a blast; and that the term "powder" is used synonymously with explosive or dynamite. (See Transcript of Record, pp. 67 and 68.)

On the trial two witnesses testified that the dynamite being used by the sub-contractors, at the time and about the time of the accident, was in wrappers which were bleached or discolored, and seemed to be covered with an oily moisture, and that some of the boxes and sticks of dynamite had the figures "May 15, 1907" printed on them. The expert mining engineer and chemist, I. F. Laucks, testified that when oily drops or "sweats" collect on the wrapper, it indicates that the nitroglycerine

has freed itself from the other substances and collected upon the wrapper, and that such condition arises as a result of the dynamite having been stored in a moist atmosphere, and that the reason the age of the dynamite affects its character as to danger is because greater opportunity is given for the nitroglycerine to separate from the other constituents of the dynamite. He also testified that, in loading dynamite, one should remove the paper wrappers or cartridges and press the dynamite carefully into the hole and tamp it, not by hard blows, but by pressure alone; and that the paper wrappers are kept about dynamite for the purpose of protecting it from jars,—showing and indicating by his testimony that any sudden jar or shock is likely to cause a premature explosion of any dynamite, all of which squares with common knowledge and ordinary judgment. This witness further testified:

“Q. Now, Mr. Laucks, as I understand you, time in showing any deterioration of dynamite is chiefly influential in that regard because it gives so many opportunities for the nitroglycerine to separate from the sawdust or other inert substance?

A. That is one of the reasons, yes.

Q. If it is kept at an even temperature, preserved from extremes of heat and cold and preserved from moisture it takes longer to deteriorate than it otherwise would?

A. It does.

Q. If you take dynamite and unload it, haul it over the ice, and lay it out in the snow and put it in sheds for five or six weeks, so that the wrapper becomes discolored by moisture—that treatment and that method of handling it would cause it to deteriorate rapidly, would it not?

A. It would—a moist climate.

Q. If dynamite is put in a wet or damp place and held for five or six weeks, it would deteriorate very rapidly under those conditions?

A. It would.

Q. Dynamite that has deteriorated, as you say, so as to go off suddenly, easily, that will occur whenever it is given a very severe shock, will it not?

A. Not necessarily a severe shock. It will when it is given a severe shock, but if you mean whether it needs a severe shock—

Q. I say a severe shock will explode it?

A. Yes.

Q. If a box of dynamite is put near a hole where a blast is exploded suddenly, and if the box of dynamite is blown to pieces and the dynamite is scattered all around over the surrounding rocks in the tunnel and that dynamite does not explode, would you say it was badly deteriorated?

A. I hardly heard the question.

Q. Suppose that I have a box of dynamite situated in front of a hole and I explode the hole so that the box of dynamite is blown all over the rocks and the dynamite is blown all around over the rocks in that neighborhood and it does not explode, is that dynamite very badly deteriorated?

A. No, I should not say that it was."

The case on the facts stands in this way: In the hypothetical question propounded by counsel for the plaintiff, it was inquired if dynamite was badly deteriorated, and was being handled and used carefully, and exploded, what would be the cause of such explosion? The expert witness answered that it would be because of the defective condition of the dynamite. That answer would have been evidence, if the elements stated in the hypothetical question appeared in the evidence. But, it affirmatively appears that while there may have been some bleaching or discoloration upon the wrappers of the dynamite, yet either that had not affected the character of the dynamite, or the witness testifying to the discoloration had not properly discerned the facts or had mistakenly stated them. It appears that the dynamite was not defective and had not deteriorated. The dynamite purchased by Heney from the Katalla Company and furnished to these sub-contractors had been used continually by them in this work from February till May 26th, 1910. We say "used during that period," because the tunnel was commenced in January and dynamite was supplied there during the months of February, March and April (Transcript of Record, p. 128),

and there is not a hint in the record that it had been found defective or insufficient. It further appears from the undisputed evidence that when subjected to the jar of this explosion, and thrown about the loose rock in the tunnel, it failed to explode. The expert witness states that when dynamite has deteriorated to the extent claimed by the plaintiff, that it was likely to explode spontaneously or from a light touch, and of course the more shock that was applied to it, the more likely it was to go off. (Transcript of the Record, p. 104.) He well says that any dynamite which was subjected to the force which the dynamite Riley was using was subjected to, and did not explode, had not deteriorated. (Transcript of Record, p. 108.) We would not have to wait upon expert testimony for this information. The mere statement of the circumstance has already brought us to that conclusion. The facts here do not show any defective condition of this dynamite. They do show an "unexplained explosion." The hole into which Riley was tamping the powder had been shattered by blasts which failed to blow it out, and it is reasonable to suppose that Riley, in tamping the dynamite, encountered some obstruction or ragged edges of rock, and violated the rule fixed by the expert witness "to press

the powder in carefully, not by hard blows, but by pressure alone," and that the explosion occurred by the shock which the dynamite received while being tamped in such an improper manner. This question, in substance, was propounded to the expert witness: If one should take dynamite, it not appearing one way or the other as to its condition, and should undertake to load it into a hole in which dynamite had theretofore been exploded, and in ramming that powder into the hole there was an explosion, what would be your judgment as to what caused the explosion?

To which the answer was:

"A. That is a pretty broad question to answer.

Q. It does not require an expert to answer that, —it requires a little common sense, is not that about all?

A. Well, I cannot answer that question unless I know some of the conditions, if you say they simply loaded it into the hole, I don't know how.

Q. Without any knowledge that that powder was good or bad, and without any knowledge as to what the man was doing to it at the time the powder exploded, you cannot tell what caused the explosion, can you?

A. No, I could not.

Q. It is purely guess-work?

A. Yes."

(Transcript of Record, p. 106.)

So, here, upon the record as it finally stands, it still remains "pure guess-work." There are certain facts that we do know, and that is that the dynamite sold by the Katalla Company to Heney and delivered during the winter and spring months, was not defective, because it was used during that period without trouble. If the case or box of dynamite which Riley had in the tunnel that day, had been deteriorated as claimed by plaintiff, the whole box would have been exploded and not a soul would have been left to tell the tale. There are about 180 sticks of dynamite in each case (Transcript of the Record, p. 84).

As the case stands, it does not appear that the explosion was caused by defective dynamite, and upon the other hand, the real cause of the premature explosion is not certainly known. It might have occurred, as suggested by the trial judge, in his instructions, through a hidden or latent defect in the stick of dynamite used, or by a condition induced by the unusual formation of the hole in which it was used, or by the negligence of the men who were using the dynamite, or from some cause not observed or reported by the witnesses. No one knows how it occurred. There is no presumption of law that it occurred through any defect in the dyna-

mite. If this action had been brought against the sub-contractors, the unexplained happening of the accident would have been *prima facie* evidence of negligence in handling the blasting, and the sub-contractors would have been compelled to explain the explosion as having been caused other than through their negligence, or a presumption of negligence would have arisen as against them.

Klepsch v. Donald, 8 Wash. 162;

Beall v. Seattle, 28 Wash. 603.

If such presumption of negligence against the sub-contractors would obtain in an action against them, the same presumption should obtain in this action.

In the case of *Gibson v. Milwaukee Light, etc., Co.*, 128 N. W. Repr., 877, the Supreme Court of Wisconsin had to deal with a problem akin to the one here, except that that was a case where the relation of master and servant existed between the parties. The master furnished the servant a fuse, and it was claimed by the servant that the fuse was defective, thereby causing a delayed explosion to his injury. The evidence left the matter in doubt as to what caused the injury, there being several matters which might have caused the delayed ex-

plosion, and the evidence as to the defective fuse was (as here to the defective dynamite) vague and unsatisfactory. The court said:

“We have, then, not only a situation in which an inspection would, in all probability, not have disclosed any defect in the fuse, if one had existed, but also a situation where it is a matter of conjecture as to whether or not the delayed explosion was the result of any defect whatever in the fuse. It might result from the acts of the plaintiff himself. No one can make more than a guess as to what its cause was, and several guesses equally plausible may be indulged in. There is no reasonable certainty that any one suggested cause was in fact the cause of the delayed explosion. Its real cause lies wholly in the field of conjecture, and is as likely to be found outside of the sphere of defendant’s duty as within it. Hence no actionable negligence can be predicated thereon.”

The pertinency of the language above quoted to the facts of the case at bar is obvious and patent, the reasoning commends itself to an impartial judgment, and the logic is irresistible. In a long line of cases in this jurisdiction, in the Supreme Court of Washington, this rule is firmly established. In order for one to recover for an injury, it is necessary for him to show, not only that the party to be held liable has been guilty of negligence, but that such negligence was the cause of his injury. There must be evidence, direct or circumstantial, that there was negligence on the one side, and injury resulting

in damages on the other, and that the injury and damage follow the negligence, and were produced thereby. While it is true that the weight of the testimony is entirely for the jury, yet mere speculation and conjecture must not be confused with legitimate testimony.

Whitehouse v. Bryant Lbr. &c. Co., 50 Wash. 563;

Hanson v. Seattle Lbr. Co., 31 Wash. 604;

Armstrong v. Cosmopolis, 32 Wash. 110;

Reidhead v. Skagit County, 33 Wash. 179;

Stratton v. Nichols Lbr. Co., 39 Wash. 323;

Olmstead v. Hastings Shingle &c. Co., 48 Wash. 675;

Peterson v. Union Iron Works, 48 Wash. 505.

Also see:

Patton v. Texas &c. R. Co., 179 U. S. 658.

WHAT WAS THE CONDITION OF THE EXPLOSIVE WHEN IT LEFT THE POSSESSION OF THE KATALLA COMPANY?

It appears from the testimony of Johnson that he understands that Sam Rollin, the sub-contractor, is dead, and from the testimony of E. E. Siegley and others it appears that M. J. Heney is also dead. One is also justified in arguing that as a rule station men

do not afford a very promising source of recovery. Under the conditions, the defendant in error must rely upon recovery against the Katalla Company. It is a matter of fair argument, therefore, to say that an industrious effort has been made to switch the cause of the accident from the acts of the station men to proof of defective condition of the explosive. This effort, however, as we have seen, has been futile. Whatever attempt may have been made to suggest a deteriorated condition of the dynamite on the day of its use, there is nothing to show that such condition existed when it left the possession of the Katalla Company. The only evidence as to how the dynamite was furnished by the Katalla Company is the testimony of Samuel Murchison, Heney's superintendent. This witness testifies that after the execution of a second agreement between Heney and the Katalla Company, under which they were operating in 1910, Heney furnished the powder to the station men, and it was supplied by the Katalla Company to Heney at a set selling price (Transcript of Record, p. 71). He also testifies that work on the tunnel at "Mile 123" was commenced in January or February, 1910, and that Heney began freighting dynamite or explosives to that point about the last of January, and that they afterwards sent some up

in February, in March and in April (Transcript of Record, p. 128). The accident occurred May 26, 1910. There is no intimation that anything was wrong with this dynamite at the time it left the possession of the Katalla Company and went into the possession of Heney. Heney transported the explosive to different points along the line and distributed it to the station men who kept it for use as needed. It further appears affirmatively from the testimony of the superintendent that there was no apparent defect in this dynamite when it was furnished by the Katalla Company, or rather, at the time Heney furnished it to the men upon the station. (Transcript of Record, p. 72.) That part of the testimony is the only testimony in the record establishing the condition of the dynamite at the time it left the possession of the Katalla Company. We are, therefore, confronted by the fact that the superintendent of the contractor, when he took delivery of the dynamite and distributed it to the station men, discovered nothing in its character showing any deterioration. If the dynamite exhibited the appearance which the witnesses claim that it had on the day of the accident, it had acquired such appearance, and had undergone the alleged process of deterioration while in the pos-

session of the sub-contractors. While we are dealing in this case in mere matters of conjecture and hypothesis, it is a good working hypothesis to assume that this discoloration mentioned by the witnesses, occurred in the Alaskan camps during the winter and spring months. The expert witness of defendant in error, says:

“Q. If it (dynamite) is kept at an even temperature, preserved from extremes of heat and cold and preserved from moisture, it takes longer to deteriorate than it otherwise would?

A. It does.

Q. If you take dynamite and unload it, haul it over the ice, and lay it out in the snow and put it in sheds for five or six weeks, so that the wrapper becomes discolored by moisture—that treatment and that method of handling it would cause it to deteriorate rapidly, would it not?

A. It would—a moist climate.

Q. If dynamite is put in a wet or damp place and held for five or six weeks, it would deteriorate very rapidly under these conditions?

A. It would.”

The absurdity of the contention of defendant in error appears by recitation of a few facts: Here is an invoice of dynamite delivered by the Katalla Company to Heney. It is claimed that it is so badly deteriorated that it is apt to be prematurely exploded at a slight touch or any rough handling. It

is loaded on the wagons, hauled by teams over rough roads, unloaded, distributed to different camps, stored in log houses, used during a period of four months by large numbers of men, and yet it failed to explode, except in the one instance where it was being rammed into a shot hole, and being handled by men who had the opportunity of inspecting every particle that went into the hole. What conclusion would reasonable minds draw from these admitted facts? Would it be that this dynamite was unsafe, defective and extra-hazardous, when Heney took it from the Katalla Company? Did it deteriorate between the time it left the Katalla Company and the 26th of May? Was it defective and extra-hazardous on the 26th of May? Did the explosion occur because of its extra-hazardous character? None of these questions are answered in the record, except there is the irrefutable proposition that at the time the Katalla Company delivered it, its condition was not as charged in the complaint.

The court charged the jury (Transcript of Record, p. 140) that if at the time the dynamite left the possession of the defendant company it was not of an extra-hazardous and unnecessarily dangerous character, then there would be no liability. This is patently the law. There is not a syllable of testi-

mony nor a single fact which shows that it was “extra-hazardous and unnecessarily dangerous” when it left the possession of the defendant company; but, on the other hand, the contractor’s superintendent discovered nothing wrong with it, and all of the circumstances go to show that it did not then have the extra-hazardous and dangerous character referred to by the court. Not only did the jury fail to follow the law and the evidence on this point, but the trial court grievously erred in permitting the case to go to the jury, and later in overruling the petition for new trial on this ground. This court is looked to for the correction of these errors.

DID THE COMPANY OWE ANY DUTY TO JOHNSON?

No contractual or other relation existed between the Company and Johnson. This fact is conceded, and the court so charged the jury. The only rule of law by which plaintiff in error may be held liable is the rule that it owed a duty to all the world, a violation of which renders it liable to any member of the world injured. The cases of negligence falling within this rule are those involving poisonous drugs, high explosives and other dangerous commodities. One who knowingly delivers a dangerous explosive, without giving notice of its intrinsic dan-

ger, is liable to any person who is injured thereby, without reference to any privity of contract, is a general statement of the rule.

Weiser v. Holzman, 33 Wash. 87.

This case fully expresses the rule and carries it to its utmost limits.

See also:

Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159.

These cases announce and apply the rule on which defendant in error relies, and the doctrine and reasons are there stated, and the limitations of the rule aptly indicated. This rule is applied and has been applied almost wholly to the manufacturer of the article. The rule had its origin in those cases where a poisonous drug was put out labelled as an innocent one, or naphtha, benzine or some other highly explosive oil as ordinary illuminating oil, or a highly explosive dynamite instead of a slow powder, or a bottle of champagne cider charged with an explosive and likely to explode, vended as an innocent package and not liable to explode. In all of these cases there are the elements of misrepresentation, fraud or deceit.

In the case at bar there are no such elements charged or proven. The only charge is that the dynamite was aged and had deteriorated in quality. According to the evidence, if these facts were true, this condition of the dynamite was open and apparent to Heney and the sub-contractors who were dealing in it. It was entirely competent for those to whom the Company delivered the dynamite to purchase and undertake to use dynamite of the age and which had been subjected to the exposure stated; and when they undertook to do so, the Company is in no way liable to persons injured by such use. It must be admitted that if these persons had knowledge of the facts (and there is nothing to show to the contrary), and a careful inspection would have revealed the facts they could rightfully purchase and use such dynamite, subject to any liability which they might incur by reason of such use. They might assume to use it, for instance, because they could obtain it for less money or because of inability to get any other, and they had a lawful right so to do, assuming all the consequences of such use. Having the right and power to purchase and use such dynamite, they were burdened with the duty of knowing what they were getting, and the proximate and efficient cause of this accident was the breach of

their duty in that regard, and if the dynamite be defective, they are liable and the Company is not. Their act in purchasing this dynamite, without any showing of fraud, deceit, misrepresentation or suppression of facts by the Company, constitutes an independent, efficient human agency, intervening between the act of the Company in selling and the accident itself.

THE ACT OF SELLING THE DYNAMITE WAS NOT THE
PROXIMATE AND EFFICIENT CAUSE OF
THE ACCIDENT.

In this connection we shall desire to have considered the assignments of error relative to the instructions given and refused by the court, as contained under Specifications of Error numbered II, III and IV.

The plaintiff in error requested the court to charge the jury to the effect that no contractual relation existed between Johnson and the Company, and that the act of selling the explosive was not the direct and proximate cause of the accident, but there was the independent and intervening act of the contractor in furnishing and using the dynamite. The court modified and refused these requests so as to decline placing such an instruction before the

jury. And, without modification or limitation, the court instructed the jury in substance that where one lets a general contract for the construction of a railroad, knowing that large numbers of men are employed in the work of construction, and furnishes an explosive to be used by those doing the construction work, it is the duty of such a person to use care to see that the explosive furnished is not unnecessarily dangerous. This instruction would not have been objectionable if it had been limited as contended for by plaintiff in error and as requested in its requested instruction No. II. The court, however, refused that portion of requested instruction No. II, limiting the general charge, and sent the case to the jury upon precisely the same instructions as would have been proper if the facts in the case were akin to those in *Weiser v. Holzman, supra*, and like cases.

Plaintiff in error is not charged either by the pleadings or proof with having sold or delivered nitro-glycerine instead of dynamite, or gun cotton instead of dynamite, or with having delivered dynamite where black powder was promised and expected, but only with having delivered dynamite aged two years and exposed to the elements. While we admit the rule on which defendant in error relies

in its fullest scope and measure, and are not seeking to de-limit it as it has been applied in the adjudicated cases, we insist it is not applicable to the state of facts in this case. Like all rules of law, it has its natural and reasonable limitations beyond which it cannot be justly extended. This cause falls outside of such limitations, and the rule contended for does not reach it and cannot be justly applied to it, without directly overturning two other primary, fundamental rules of law, namely:

1. That the law looks only to the proximate and not to the remote cause;

2. That when an article has been manufactured and delivered or transferred by vendition, without the element of fraud, misrepresentation, deceit, or mis-statement as to its nature, quality, kind and character, then the liability of the manufacturer or vendor ceases and that of the vendee or user begins.

The sticks of dynamite and the boxes in which they are contained, if we are to believe the evidence of the witnesses Carson and Johnson, had stamped on them the date May 15, 1907, and the wrappings in which the dynamite was held were discolored and covered with an oily moisture, which indicated the exudation of nitro-glycerine. If these conditions

showed anything, they showed the age and deterioration of the dynamite. If we admit that the dynamite was deteriorated when it left the Company, it was a fact which was open and apparent to the contractor and sub-contractors. It was open and apparent to Sam Rollin and Ed Riley and within their knowledge when from time to time they took the same and used it. They knew what they had obtained from the Katalla Company and from Heney, and they knew as well as the Katalla Company did everything concerning its age and deterioration. The Company was not the wholesaler or manufacturer of the dynamite. It had it in its possession. It sold the explosive to Heney, who had equal means of knowledge of its character with the Katalla Company. Heney delivered it to the sub-contractors, who had better knowledge of its condition at the time of use than any of the preceding parties. It was not like the case of selling a gun knowing of its latently defective construction, or of selling naphtha, representing it to be oil, or delivering to a carrier a carboy of nitric-acid without disclosing its contents, or selling a nostrum as an innocent medicine when it contains injurious qualities.

In the case of *Weiser v. Holzman, supra*, the dangerous explosive was sold and delivered under

the innocuous name of "champagne cider" without anything to indicate that it was a dangerous explosive.

In *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, naphtha was put out instead of oil, and the court said:

"In view of the tendency of the proof as to the entire absence of knowledge by Powers and Deselms, when purchasing from the Oil Company, and the ignorance of Deselms when he bought from the firm, of the character of the fluid, it is certain that in the case before us the act of the Oil Company in any view was the proximate cause of the accident, and *no other independent or efficient cause or wrong can be legally said to have occasioned the same.*"

The italics in this quotation are our own. This quotation indicates the very reason for non-liability which we insist upon in this case. The plaintiff in error did not pretend to furnish dynamite and furnish something else. It did not pretend to sell a harmless substance and deliver a dangerous one; but it delivered an explosive in a condition which was known and understood by all parties to the transaction, and such act of selling was not the proximate cause of the accident, because, contrary to the facts in the Deselms case, there was another independent and efficient cause intervening.

What was the legal effect of the transfer and delivery of such defective dynamite to the users thereof? The users were conducting blasting operations and had purchased or acquired this dynamite for the purpose of such operations. It then became clearly the duty of the users of the dynamite to so inspect it as to prevent the likelihood of injury to others, they being in full charge of the dynamite and of the blasting operations, and to perform all the duty the law requires of any one to others likely to be injured by the dynamite in the blasting operations. This duty was full and complete. It not only included the duty to conduct the operations themselves in a careful and harmless manner but to use dynamite suitable for the purpose and unlikely to do harm. Clearly, the plaintiff could recover from these users of the dynamite. Clearly, they are primarily liable to him, and as we contend, not only primarily liable but solely liable. While it does not necessarily follow that because plaintiff has a complete and perfect cause of action against the users of the dynamite, he has no cause of action against others, yet if the ^{causal} ~~causal~~ connection of the accident is broken by the interposition of an independent human agency between the act of defendant and the accident, consisting in the neglect of duty

of the users of the dynamite to use all precautions with reference thereto, including the precaution of inspection and examination, then the efficient cause of the accident is the breach of duty owing by the users of the dynamite, not the preceding tortious or negligent act of the defendant, which, in the eye of the law, is merely one of a chain of circumstances leading up to the accident.

The foregoing principle was adverted to in the *Waters-Pierce* case above cited. Also see, *Losee v. Clute*, 51 N. E. 494.

In *Huset v. J. I. Case Co.*, 120 Fed. 865, 61 L. R. A. 303, the general rule is clearly stated as follows:

“So, when a manufacturer sells articles to the wholesale or retail dealers, or to those who are to use them, injury to third persons is not generally the natural or probable effect of negligence in their manufacture, because (1) such a result cannot ordinarily be reasonably anticipated, and because (2) an independent cause—the responsible human agency of the purchaser—without which the injury to the third person would not occur, intervenes, and as Wharton says, ‘insulates’ the negligence of the manufacturer from the injury to the third person.”

The learned writer of that opinion, Mr. Justice Sanborn, then proceeds to note the exceptions to the general rule, the two first of which are not pertinent to this case, and the third is stated as follows:

“The third exception to the rule is that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not.”

It will be seen that the authorities cited to sustain the third exception all contain the element of misrepresentation, fraud or deceit in the original sale.

The cause of action presented in this case presents in our judgment no such element as that found in the cases sustaining the third exception to the general rule, for which plaintiff in error contends, and which third exception constitutes the general rule on which defendant in error relies.

The persons to whom the dynamite was supplied undoubtedly became subject to the duty of knowing its nature, its condition, and its defects, if any, and of using the dynamite with reference to such knowledge, subject to the penalty of being liable to any one injured for their want of care in handling the dynamite. The interposition of the independent human agency and the independent negligence of this human agency is so clearly ap-

parent in the case pleaded that it seems to us it falls directly within the rule laid down by Wharton, and recommended by the court above quoted, as “insulation.”

The court will bear in mind that the rule on which defendant in error relies does not rest at all upon the extension of the contractual obligations between the manufacturer and the vendor, and his vendee, to third persons or strangers, but rests wholly upon the violation of a primary duty of the manufacturer or vendor owing from him to all the world. It is therefore immaterial whether plaintiff in error violated any contract of implied or express warranty as to condition of the dynamite, when it furnished same to those who were using it. Such violation of its contract as we have pointed out above, does not render it liable to third persons in the neighborhood of the dynamite injured while the purchasers thereof are using it. In fine, this case must rest wholly upon the ground that the Company was guilty of breach of duty which it owed to all mankind when it delivered to the blasters dynamite two years old which had been exposed as alleged in the complaint. We do not think this is the law nor the rule. It was entirely competent for those to whom the dynamite was delivered to undertake to

use dynamite of that age which had been subjected to the exposure stated. And when they undertook to do so, defendant is in no way liable to persons injured by such use.

In conclusion, we desire to call the attention of the court to the fact that there was no dispute in the evidence. The case was tried upon the testimony of witnesses produced by the plaintiff below. The case made out was one purely of law for the court, upon the motion of plaintiff in error for a directed verdict. We respectfully submit that the judgment below should be reversed and the case remanded with instructions to enter judgment in favor of the plaintiff in error here and defendant below.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

THE KATALLA COMPANY,
a corporation,

Plaintiff in Error,

v.

JOHN P. JOHNSON,

Defendant in Error.

No. **2158**

*Error to the United States District Court for the
Western District of Washington,
Northern Division.*

Brief of Defendant in Error

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Brief of Defendant in Error

STATEMENT.

The Copper River & Northwestern Railroad engaged the Katalla Company to build a railroad for it in Alaska. The Katalla Company sublet the construction of the road to M. J. Heney, but fur-

nished all the explosives used in the construction of the road as part of its agreement with Heney. (Rec. 131, 132; 127-132; 69-71.)

In the spring of 1910 defendant in error sought and obtained employment on the construction of the road. While he said he was working for the station men, he was brought up there by Heney.

“Q. Who did you see in Seattle in reference to that?

A. I saw Mr. Heney's agent on the wharf.

Q. And then what arrangement did you make, if any, with him?

A. We made an arrangement with him and secured our ticket through him. * * *

Q. What arrangement did you make through him?

A. We made an arrangement with him to go to Cordova and be shipped on from there.

Q. Where to?

A. To the construction work on the Copper River Railway.

Q. And for what purpose?

A. For the purpose of working on the railroad.” (Rec. 73, 74.)

The witness further said, that when they came to Cordova they were given a pass and shipped up to the place of construction. (Rec. 74.)

On the 26th day of May, 1910, he was working on station 123, in a rock tunnel where dynamite was used. While he was so doing, two other men, employed on the same job, were loading a hole with dynamite in the usual and careful manner, and the dynamite exploded prematurely, while in the process of loading, inflicting the injuries complained of. The dynamite was furnished by the Katalla Company under its agreement with Heney. The dynamite was delivered to Heney at Tiekill and by him taken to the men on the work; that delivered at mile 123 was in Heney's possession from five to eight hours, and while in his possession it was not exposed to the weather nor any condition which would tend to render it extra hazardous, (Rec. 128, 129), and Heney had no knowledge that the dynamite was more than two years old (Rec. 131) nor that there was any other defect in it. (Rec. 72.) And while the dynamite was in the hands of the men on the work it was properly stored and cared for. The dynamite furnished by the Katalla Company to the men on mile 123 and which was used at the time of the premature explosion was more than two years old, and the wrappers were discolored and covered with an oily substance or liquid, showing the presence about the wrappers of free nitro-glycerine, ren-

dering it extremely hazardous to handle. (Rec. 100, 101.) The premature explosion was caused by the extra hazardous and defective condition of the dynamite, according to the opinion of the expert. The facts will be further stated and the record cited in detail in the argument. There are a few inaccuracies in the statement of the facts in plaintiff in error's brief, but they will be pointed out as the argument proceeds.

ARGUMENT.

Plaintiff in error is held liable for the injuries sustained by defendant in error under two well established legal principles, viz:

1. "In the absence of provision therefore in the contract, the contractee is usually under no duty to furnish any appliances for the contractor, but if unsafe appliances are furnished by the contractee and a servant of the contractor is injured thereby the contractee is liable, especially where it is the duty of the contractee to furnish the appliances because of his agreement with the contractor." (Quoted *verbatim* from text of 26 Cyc. 1568.)

2. "The manufacturer or vendor, who deals with an article imminently dangerous in kind, owes to the public a positive and active duty of employing care, skill and diligence to limit that danger. In such case the liability does not rest upon the ground of warranty, * * * nor does it depend on privity of contract, but arises from a duty not to expose the public to danger. Articles of the kind

under consideration are dangerous chemicals, explosives, poisons and dangerous drugs.” (29 Cyc. 479.)

Plaintiff in error has noticed only the second of these principles in its brief, although I rested my case chiefly on the first and that was the theory upon which the case was submitted to the jury as shown by the court’s instructions. The court instructed the jury in part as follows:

“It is the law, however, that if the owner of a railroad engaged in constructing that railroad, lets out a general contract for the construction of the road and knowing that that contract has been let and that large numbers of men are to be employed or have been employed in the actual work of construction, furnishes an explosive to be used by the individuals who are to actually do the definite construction work, it is the duty of the owner of the railroad furnishing that explosive under those circumstances, to exercise ordinary care to see that the explosive furnished is not unnecessarily dangerous. That is, if the facts are as contended for by plaintiff, along the lines which I have just mentioned, it was the duty of the defendant company to act with ordinary prudence to see that the dynamite which it furnished and which was to be actually used in the blasting of such excavations should not be defective so as to be extra hazardous and unnecessarily dangerous. If the defendant company used ordinary care to that end within the definition which I have given you, then it discharged its duty and no matter how many accidents might occur from the use of the dynamite there would be no liability.” (Rec. 139.)

Plaintiff in error contends throughout its brief that it can be held liable only as a vendor. That it

sold the dynamite to Heney. Even so, I contend that it is liable, if it sold defective and extra hazardous dynamite without giving notice of the extra danger; but I contend that the evidence shows that it furnished the dynamite under its contract with Heney, and as part of the contract, to be used by the men who were to do the actual construction work. This I think appears both from the evidence and from inference legal drawn from the company's silence on the point, and positive refusal to produce the contract with Heney.

The complaint charges plaintiff in error with negligence as follows:

“1. That the defendant above named now is and at all time herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of New York, and doing business in the State of Washington, and having its principal office in King County, Washington, and was engaged in the construction of the Copper River & Northwestern Railroad, near Copper River, Alaska. That on the 25th day of May, 1910, the plaintiff was employed as a laborer on the construction of said road at a place about one hundred and twenty-three miles from Cordova, Alaska, and the work was rock work, the rock being blasted and removed by the use of dynamite, which was furnished by the defendant for that purpose.

“2. That at said time the defendant negligently and carelessly furnished the men working with the plaintiff and in his immediate neighborhood danger-

ous, unsafe, defective and extra hazardous dynamite for use by them in blasting, in this, to-wit: That the dynamite so furnished was more than two years old and by reason thereof unsafe to use and liable to explode prematurely, though handled ever so carefully. That the dynamite so furnished by the defendant had further been exposed to the air, wind, rain and snow, heat and cold, before it was given to the men for use, thereby rendering it extra dangerous, unsafe to use and liable to explode prematurely, though handled ever so carefully. * * * That said defendant negligently and carelessly failed and neglected to inform the plaintiff and the men using said dynamite of the extra dangerous condition of the same.

“3. That on said 26th day of May, 1910, the men working with the plaintiff were loading a hole in the rock with the dynamite so furnished by the defendant, in a proper and careful manner, and while they were so doing, the dynamite exploded prematurely by reason of its extra dangerous and unsafe condition, caused as heretofore alleged, and without warning and near the place where the plaintiff was working, causing the injuries hereinafter alleged.”

The plaintiff and his friends knew nothing about the relations between Heney and the Katalla Company. The officers were dragged into court by subpoena by plaintiff, but proved very adverse witnesses, and although plaintiff had served the required legal notice on defendant to produce in court its contract with Heney, it refused to do so, and through a misunderstanding between E. S. Mc-

Cord and myself I did not discover that the contract held by Heney was only a copy until it was too late to compel the production of the original. The testimony of the officers of the two concerns were as follows, bearing on the relation of Heney and the company:

Mr. Siegley testified:

“Q. What occupation or position do you now occupy?

A. Executor of the M. J. Heney estate.

Q. During the life of Mr. Heney what position did you occupy?

A. I was his confidential clerk.

Q. His secretary?

A. Yes.

Q. Have you in your possession a contract made between Mr. Heney and the Katalla Company?

A. I have a copy of it.

Q. You were served with a subpoena *duces tecum* to bring that contract with you?

A. Yes.

J. Why didn't you do so?

A. I did. I have brought all that we had.

Q. Didn't Mr. Heney ever have the original or duplicate of the contract?

A. Well, this is a duplicate, I presume, but it is not marked that way. This is the only thing I ever had in my possession. As regards the other

contract, I don't know, I presume the original is out with the company. I don't know. That is the only one I have seen (showing)."

BY MR. GRAVES:

"Q. Mr. Siegley, this paper which you have produced is all in typewriting, the signatures, too?

A. Yes.

Q. It is a copy, then?

A. Yes.

* * * * *

Q. All you know anything about a contract covering the year 1910 is simply that you find a copy like this in your files?

A. That is the only one I had in my possession.

Q. And you have never compared it with the original?

A. I never have.

Q. Have you ever seen the original?

A. I don't know as I have; I may have, but I can't remember that I have.

Q. Can you say now that this is a true copy of the original, of your own knowledge?

A. Well, I can't say, because I don't know as I have ever seen the original contract. That is the only one I have ever seen."

BY MR. LUND:

"Q. This is the contract dated January, 1909?

A. Yes.

Q. That is the second contract?

A. That is the contract covering this portion of the work.

Q. 1910?

A. 1909, 1910 and 1911.

Q. That is the contract—what can you say as to whether or not this is the contract that you have followed in dealing with the Katalla Company?

MR. GRAVES: I object to that.

Q. (Mr. Lund): You have refused to give me any information whatsoever in this matter?

A. I was subpoenaed in the case and I was not supposed to give any information except on the stand.

J. When I went down to talk to you, you could not give me any information?

A. There are some points I had no right to discuss in regard to the matter that I could see.

Q. And you say that this is the only contract that you had in your possession?

A. That was the only one I had in my possession.

Q. And this is the copy which you followed and went by in your dealings with the company?

A. So far as my dealings with the company, I didn't need any copy at all. My dealings with the company up to the time that the work was being done, I didn't need any contract—my work didn't necessitate any contract.

Q. As far as you know, to the best of your knowledge and belief and judgment, this is a true copy of the original contract?

A. So far as I know, yes."

MR. LUND: Now, if your honor please, about a week, or several days ago, I served upon counsel a notice—I am offering this in evidence and I want to make the statement to the court, that some days ago I served upon the attorneys of record for the defendant company this notice (reading notice), and Mr. Graves informs me that he has not got the original here.

MR. GRAVES: The company's office is in New York City and this was served upon us four days ago, and the only contract referred to by this notice is in the office in New York City, and we had no means of getting it here at the time requested by counsel.

MR. LUND: It seems to me that upon the statement of the witness we are entitled to offer the copy in evidence.

MR. GRAVES: We object to the reception of it on the ground that it is not shown to be a copy of the contract called for by this notice. The notice, if your honor please, reads as follows (reading notice). There has been no showing that this is a copy of that contract.

MR. LUND: I will waive the question at this time and will have Mr. McCord here in the afternoon." (Rec. 23-26.)

Mr. McCord thereupon was called and testified:

"Q. (Mr. Lund). You are a practicing attorney here and have been in the practice here a number of years?

A. Yes sir.

Q. You knew Mr. Heney in his lifetime?

A. Yes.

Q. When did he die?

A. October 10, 1910, I think that is the date.

Q. Mr. Siegley is now executor of his last will and testament?

A. Yes.

Q. And you are one of the attorneys of record for the executor of his estate?

A. Yes.

Q. And you are familiar, more or less, with Mr. Heney's affairs?

A. Yes, to some extent.

* * * * *

Q. I will ask you to look at identification "A" (showing) and tell us if you have ever seen that before?

A. Yes sir.

Q. Where have you seen that?

A. It was brought to my office by Mr. Siegley, one of the executors of the M. J. Heney estate.

Q. About what time was that?

A. Oh it must have been within a month or two after his death.

Q. Where has it been since?

A. Well I think it was brought to my office in the first place by Mr. Siegley along the early part of 1911, and then it was returned to Mr. Siegley, and I think it came back into my hands some two months ago.

Q. And in what light has that paper been considered by you as one of the attorneys for the executor of the Heney estate?

MR. GRAVES: I object to that as irrelevant, immaterial and incompetent as to what light it was considered in by the witness, as not the proper method of proving a contract.

THE COURT: The point has been made, Mr. Lund—I don't know that counsel makes the point here—that the original contract should be produced, but he does make the point that there is no proof that this is a copy; that no person who has seen the original has made any comparison between that and this. I do not feel clear that the light in which Mr. McCord, as attorney of the estate, regarded it would be evidence.

Q. (Mr. Lund). I will ask you, Mr. McCord, if you have ever seen the original of that?

A. No sir, I never saw the original. This was handed to me as a copy of the contract, but I never saw the original.

Q. Where is the original to your knowledge?

A. The original—I don't know that I could say definitely, but I think it is in the hands of the Katalla Company. That is my impression, however, only. I don't know.

Q. In your dealings and in the dealings of the executor of Heney's estate with the Katalla Company in reference to the matters specified in that contract that copy which you hold in your hand—what has that been taken to be between both you and the Katalla Company?

MR. GRAVES: I object to that as irrelevant, immaterial and incompetent. It is getting at the same thing in a round-about way.

THE COURT: If it can be shown that the Katalla Company has recognized this as a copy of the contract I think it is material, but the question is too broad and I will sustain the objection.

Q. (Mr. Lund). You have heard the matter discussed, Mr. McCord, now tell what you know—what can you say with reference to it. You know more about the matter of getting at this thing than I do. Tell us what you can, Mr. McCord?

MR. GRAVES: Do you want to associate him with you in this case?

MR. LUND: Go ahead.

MR. GRAVES: I think that I have a right to have a question asked of a witness so that I can object to it.

Q. (Mr. Lund). Can you state, Mr. McCord, that the paper which you hold in your hands—the provisions in that—the provisions in that paper—the agreements made in that paper have been recognized by the Katalla Company, or the Katalla Company's attorneys as the contract between the Katalla Company and Heney in your dealings with the Katalla Company?

MR. GRAVES: I object to that upon the ground the question is incompetent and the evidence called for is incompetent.

THE COURT: The question calls for the opinion of Mr. McCord on that subject as to what has been recognized. What would amount to a recognition is a matter on which men would differ very much. If there is any evidence showing that any

agent of the company has seen this copy of the contract and said it is all right, then, perhaps it might be shown. I will sustain the objection.

Q. (Mr. Lund). Has any of the attorneys for the Katalla Company or any of the officers of the Katalla Company seen that contract or that copy which you have and recognized it and acknowledged it as being the contract in question?

MR. GRAVES: I object to that. The attorneys or any officer is not able to bind this company unless it is shown that it is some one who is capable of speaking for the company.

THE COURT: I will sustain the objection to so much of the question as relates to the attorneys, but as to so much as relates to the officers I will overrule the objection.

A. I will have to ask somebody a question. I do not know who the officers of the Katalla Company are. Mr. Young or Mr. Youngs—if Mr. Youngs is an officer of the Katalla Company—I will have to know, your honor, before I can answer the question.

MR. LUND: Do you know whether that is a fact?

MR. GRAVES: My understanding is that he is not—that there are no officers of the Katalla Company in Seattle. I cannot state that definitely, but that is my belief.

A. I can state—I don't want to volunteer anything—but I can state that if Youngs was, I could state that I talked with him.

Q. State what your dealings have been with Mr. Youngs?

A. I don't know whether he is an officer or not.

MR. GRAVES: I object unless the witness knows.

A. I am not able to state whether Youngs is or not.

THE COURT: The court cannot take any judicial notice of Mr. Youngs' authority.

Q. (Mr. Lund). I will ask you Mr. McCord, if you will tell us in what respect you have dealt with Mr. Youngs?

A. Well I have discussed with Mr. Youngs the relative rights of the M. J. Heney estate and the Katalla Company under this contract, as to certain phases of the contract. The discussion which I had was with Mr. Bogle and Mr. Youngs and Mr. Hawkins. I don't know whether those men are officers of the company or any of them, I can't say, but they discussed the matter with me.

Q. Mr. Bogle is one of the attorneys of record in this case. You mean Mr. Bogle of Bogle, Merritt & Bogle?

A. Yes, Mr. W. H. Bogle, yes.

Q. In what capacity was Mr. Youngs, apparently, acting at the time?

A. Well we had a dispute over a certain clause in this contract as to certain charges for freight, or failure to carry freight up the river, and we used this copy of the contract in discussing it, and that is all I know, but I don't know whether Mr. Youngs—I don't know what his capacity was.

Q. And what position did Mr. Youngs take in reference to that being a true copy of the original contract? * * *

A. Well, we—Mr. Shields, who was in the employ of the Heney estate—of M. J. Heney during his lifetime in the construction of the road—and myself went over to Mr. Youngs' office about three weeks before Christmas, as I remember the date—I am not positive—to discuss certain features of this contract and I had this copy with me, and we had occasion to refer to the clauses of the contract and I passed it over and Mr. Youngs examined that contract and Mr. Bogle, and I read parts of it, and from that we based our discussion as to the relative rights of the parties as to that feature that we were discussing. * * *

Q. Now, Mr. McCord, I will ask you if you recollect that I spoke to you about that contract some time ago?

A. Yes, you did.

Q. And that you told me at the time that you or Siegley had the contract for the construction of the road?

A. That was the contract that I thought we had.

Q. You thought it was the original, didn't you, at the time you spoke to me?

A. Yes, I supposed that was the original—I didn't have it in mind when you were talking to me, but I supposed it was the original, and I felt so sure it was the original that today, since I was here this morning, I went through all the papers in connection with the Heney estate in my office thinking that perhaps the original was there, but it was not.

Q. It was not there?

A. No sir—at least I could not find it." (Rec. 91-96.)

J. H. Young, referred to by McCord as Youngs, was thereupon brought into court under subpoena, and the following occurred:

“Q. (Mr. Lund). You live in Seattle?

A. Yes.

Q. Engaged in what work?

A. I am president of the Alaska Steamship Company.

Q. And do you remember having a conference with Mr. McCord some few weeks or months ago in reference to the contract between Mr. Heney and the Katalla Company as to the construction of the Copper River road?

A. Yes.

Q. Where did that conference take place?

A. In my office.

Q. Whom did you represent?

A. The Copper River & Northwestern Railroad.

Q. Was that contract between Heney and the Copper River & Northwestern Railroad?

A. No sir.

Q. I will show you a paper here marked “Exhibit A, refused,” and I will ask you if you have ever seen that before (showing)?

A. I don't know that I ever saw this copy before. Not that I know of.

Q. Have you seen the original of that?

A. No sir, I never saw the original.

Q. You never saw the original contract between the Katalla Company and Heney for the construction of that road?

A. No sir.

Q. Now the conference between you and Mr. McCord was in reference to that contract, wasn't it?

A. Yes.

Q. Is the Copper River & Northwestern Railroad a party to that contract?

A. As I understand, no; I don't think it is—it was not—it doesn't say so.

Q. It is not a party to that contract?

A. No sir.

Q. Had you had any connections with the Katalla Company at any time?

A. Not officially, no sir.

Q. Not officially?

A. No sir.

Q. What was the matter or the substance of the matter considered by you and Mr. McCord—was it in reference to that contract—wasn't it?

A. Yes.

Q. Now, tell us how the Copper River & Northwestern Railroad came to have any interest in that contract which they are not a party to?

A. The Copper River & Northwestern Railroad engaged the Katalla Company to build a railroad for it, upon which it was to pay so much money on the cost of the road—they were to pay the cost and a certain percentage for the building of that railroad. Charges are entered into there by Heney,

the contractor, which would finally revert to the Copper River & Northwestern Railroad Company, if allowed. I was negotiating with Mr. McCord as to the outcome of these charges—as to how those charges should be assessed.

Q. And you had no instructions and had no previous conference with any of the officers of the Katalla Company in reference to the matter?

A. No sir.

Q. The Katalla Company—

A. (Continuing) I will modify that. I would like to modify that, if the court please. I had a talk with Mr. Hawkins, who was the chief engineer of the Katalla Company.

Q. And he is so now?

A. No sir, not now.

Q. Has the Katalla Company got any officers here in the city now?

A. None that I know of, excepting an assistant secretary and treasurer.

Q. And who is he?

A. Mr. McMasters.

Q. (By a Juror). Do I understand that you did not represent the Katalla Company in any sense at that conference?

A. No sir.” (Rec. 131-133.)

Heney's copy of the contract was marked for identification, “Plff's Ex. A,” and offered in evidence, but rejected. It was not incorporated in the

bill of exceptions, but certified to this court as an original exhibit offered and rejected.

Having failed to introduce the contract in evidence, plaintiff called Murchison, Heney's superintendent, and although an adverse witness, he testified as follows:

“Q. In 1910 what work were you engaged in?

A. On the construction of the Copper River & Northwestern Railroad.

Q. What position did you hold?

A. I was superintendent for the contractor.

Q. Who was the contractor?

A. M. J. Heney.

Q. Who was the contractees—the one that let the contract to Mr. Heney—from whom did Heney have a contract?

A. From the Katalla Company, I believe.

Q. Who supplied the explosives that were used on the construction of the road?

A. So far as I know, the Katalla Company.

Q. And do you know where Section 123 was?

A. Mile 123.

Q. Where was that?

A. It was on the line of the road, 123 miles from Cordova.

Q. What was the nature of the construction work going on there?

A. Rock work and tunnel work.

Q. In May, 1910, what was the nature of the work going on there?

A. General construction work.

Q. Rock and tunnel work?

A. Yes.

Q. In that tunnel work and rock work were explosives used?

A. Yes sir, they had to be.

Q. And who had supplied those explosives?

A. How do you mean now?

Q. I mean who supplied the explosives that were used there at that time?

A. They were, the explosives—oh, the explosives were all gotten from the Katalla Company as far as I know.

CROSS-EXAMINATION.

Q. (By Mr. Graves). You say you were superintendent for M. J. Heney?

A. Yes.

Q. Were you in Alaska at that time?

A. Yes, I was.

Q. And M. J. Heney was the man who was contracting and building the road?

A. As far as I understand, yes.

Q. And Heney purchased his powder from the Katalla Company?

A. Well, not exactly.

Q. How's that?

A. I don't understand it just that way. They were to have furnished all the powder for the construction.

Q. All that you know about it is that Heney furnished the powder to those section men, didn't he?

A. It was after the second agreement, I believe, with the Katalla Company.

Q. After the second agreement, Heney furnished the powder to the stationmen?

A. Yes.

Q. And that was true in the spring of 1910?

A. Yes, that is on station work.

MR. GRAVES: That is all."

RE-DIRECT EXAMINATION.

Q. (By Mr. Lund). Who furnished the powder that was used by these men at the time?

A. Well, it was furnished through Mr. Heney from the Katalla Company.

Q. It was furnished through Heney from the Katalla Company?

A. Yes.

Q. Under what arrangement between them, so far as you know?

A. There was a selling price set by the Katalla Company.

Q. If the contract should appear to provide otherwise, then you are mistaken as to that arrangement, are you not?

A. I don't understand you.

Q. I beg pardon.

A. I didn't quite get that question.

Q. What do you know about it yourself, personally?

A. Nothing, excepting as we carried along with the work and the supply of powder from time to time.

Q. Do you know personally under what arrangement the powder was furnished to these stationmen?

A. They were to pay a certain price for the powder that they were using.

Q. Where did the powder come from?

THE COURT: I think he answered that several times.

A. We received it from the Katalla Company.

Q. I want to know what the arrangement was between Mr. Heney and the Katalla Company as to that powder.

MR. GRAVES: I object to that on the ground that it appears that there was a contract between the parties and that is the best evidence.

THE COURT: It appears that there was a contract and the contract will be the best evidence.

Q. (By Mr. Graves). Without reference to what the contract was, the Katalla Company had certain material in Alaska, didn't it?

A. Yes.

Q. Heney was the contractor?

A. Yes.

Q. And this work was let to stationmen along at different places?

A. Yes.

Q. And Heney had a contract of some kind with the Katalla Company and then he had a contract with each one of the stationmen for the work?

A. Yes.

MR. LUND: I want to ask one more question:

Q. What, if any, knowledge did you have as to any defect in the dynamite as it was furnished to men upon that particular station?

A. I didn't know whether—I didn't have any knowledge that there were any." (Rec. 69-72.)

Being recalled, he testified:

"Q. (Mr. Lund). As I remember, Mr. Murchison, you were the superintendent in charge for Mr. Heney up there?

A. Yes, I was.

Q. At this time, in the spring of 1910, where was Mr. Heney?

A. In California.

Q. You represented Mr. Heney?

A. Yes.

Q. And I think I asked you, but I am not sure, and I will ask you now again, for what concern was Heney constructing the road?

A. For the Katalla Company.

Q. And you remember station 123?

A. Mile 123?

Q. That was out from Tiekill how far?

A. Twenty-three miles or twenty-two miles.

Q. That was part of the road that Heney was constructing for the Katalla Company?

A. Yes.

Q. And when was that work on station 123 commenced?

A. In January of that year, January or February of that year.

Q. And when was the supply of powder or dynamite or explosives sent in there?

A. I believe we began freighting up there about the last of January.

Q. I will ask you if you didn't make the statement, to refresh your memory, that that dynamite was sent up in April—didn't you make that statement?

A. Which dynamite?

Q. The dynamite that was used at station 123?

A. Well, yes, we sent some up in April and some in March and some in February.

Q. And that which you sent to station 123—

A. During those months we supplied powder to them at those different times. * * *

Q. Where did you get the explosives that you sent in there?

A. We got them from the Katalla Company.

Q. Where?

A. At Tiekill.

Q. How did you send them in?

A. With teams.

Q. And how long were they in your possession?

A. While they were in transit from Tiekill to the different work along the line.

Q. From Tiekill to 123 is how far?

A. About twenty-two miles.

Q. How long would the explosives be in your possession while they were being transported that distance?

A. Probably about five or six hours or eight hours sometimes.

Q. And while they were in your possession were they exposed in any way to the weather or any condition which would tend to render them dangerous?

A. I think not.

Q. I asked you yesterday if you knew there was anything wrong with the dynamite when you took it and sent it in; I will ask you now if you know how old it was?

A. No." (Rec. 127-129.)

From the foregoing it positively appears that Heney was building the road for the Katalla Company.

"Q. I think I asked you, but I am not sure, and I will ask you now again, for what concern was Heney constructing the road?

A. For the Katalla Company.” (Rec. 12.)

That the Katalla Company, under its contract with Heney, furnished the dynamite used by the men, who did the actual construction work, and that the dynamite was delivered by the Katalla Company to Heney at Tiekill, twenty-two miles from station 123, and at once delivered by him to the men. The exact terms of the contract are not shown, for plaintiff in error refused to inform the court of it. While it is claimed that it had not had time to produce the contract, this action had been pending for more than one year at the time of the trial, and if the terms of the contract had in any way favored defendant's contention, I believe it would have been produced. But whatever the terms of the contract was, the dynamite was furnished by virtue of the contract.

“Q. I want to know what the arrangement was between Heney and the Katalla Company as to that powder?

MR. GRAVES: I object to that on the ground that it appears there was a contract between the parties and that is the best evidence.

THE COURT: It appears that there was a contract and the contract will be the best evidence.” (Rec. 72.)

Now, then, here is my contention: It being undisputed that Heney was building the road for the

Katalla Company, and that the Katalla Company furnished the dynamite for the use of the men doing the actual construction work under its contract with Heney, whatever the terms were, it was the company's duty, both under the law of the land and common humanity, to use reasonable care to see that the dynamite furnished was not extra hazardous or defective.

In *Coughlin vs. The Rheola*, 19 Fed. 926, the syllabus reads:

“A stevedore employed by another, who has contracted to unload a vessel, can recover for injuries sustained by the defective appliances furnished him by the vessel, upon the same evidence that would enable his employer to recover. Though there is no privity of contract between the ship owners and him, they were under the same obligation to him as they were to his employer. What would be negligence to one would be negligence to the other.”

In the opinion the court says:

“The libelant was performing a service in which the ship owners had an interest, and which they contemplated would be performed by the use of appliances which they had agreed to provide. They were under the same obligation to him not to expose him to unnecessary danger that they were under to the master stevedore, his employer. There was no express contract obligation on their part to either to provide safe and suitable appliances, but they were under an implied duty to each, and the measure of

duty to each was the same. What would be negligence towards one would be towards the other. *Coughtry vs. Globe Co.*, 56 N. Y. 124; *Mulchey vs. Methodist Society*, 125 Mass. 487. The implied obligation on the part of one who is to provide machinery or means by which a given service is to be performed by another, is to use proper care and diligence to see that such instrumentalities are safe and suitable for that purpose. 'It is the duty of an employer inviting employes to use his structures and machinery to use proper care and diligence to make such structures and machinery fit for use.' *Whart. Neg.*, 211. If he knows, or by the use of due care might have known, that they were insufficient, he fails in his duty. This doctrine is cited with approval in *Hough vs. Ry. Co.*, 100 U. S. 220. Due care or ordinary care implies the use of such vigilance as is proportional to the danger to be avoided, judged by the standard of common prudence and experience. Applying this test here, where, if the appliance to be used were defective, serious casualties were to be apprehended, it was the duty of the master of the steamer to exercise a corresponding vigilance to provide against them."

In the case of *Gerrity Bark*, 2 Fed. 241, the court says: "To be sure, the libelant was not directly employed by the shipowner, and it may be truly said that no relation by contract existed between the shipowner and the libelant. But the libelant was trimming the shipowner's ship. He was doing what was necessary to be done to enable the ship to carry the cargo in safety, and the reason why he was so employed was because the shipowner had, by a contract with the charterer, indirectly provided for the performance of this service.

“There was a relation between the shipowner and the libelant arising, not out of the mere presence of the libelant on board the ship, but out of the service he was then engaged in performing the necessity of that service to the shipowner, and the circumstances of the libelant’s employment to perform that service. The libelant had, therefore, a right to be where he was; and it follows that there was a duty on the part of the owner to see to it that the dunnage and plank stowed above him were so secured as to prevent it falling upon him of its own weight.” (Quoted from page 246.)

See also the following cases:

“Where the employer undertakes to furnish the employes of an independent contractor some of the instrumentalities for executing the required work, he must exercise reasonable care to provide such instrumentalities as will be reasonably safe.” *Green vs. Sansom*, 25 So. 332; 41 Fla. 94.

“An owner of a building is liable to bricklayers injured by defects in a scaffold built for them by carpenters in the employ of the owner.” *Chicago A. R. Co. vs. Scanlan*, 48 N. E. 826.

“Where the owner of a logging railroad furnished an independent contractor a locomotive not equipped with a spark arrester, which in passing plaintiff’s residence threw sparks igniting the roof of the house, the owner of the railroad is liable for the injury.” *Brady vs. Jay*, 36 So. 132; 111 La. 1071.

“A railroad corporation made a contract with a person to build a culvert alongside its railroad and furnished a derrick for use in the work, which fell, in consequence of a defect existing when the derrick was delivered to the contractor. *Held*, that the cor-

poration was liable for injuries occasioned thereby to a third person." *Conlon vs. Eastman R. Co.*, 135 Mass. 195.

"An elevator company which, for compensation, furnishes a steam shovel and appliances to one desiring to unload a boat load of grain into its elevator, and a man to see that they are put up right, having negligently furnished a defective rope in the tackle which breaks, letting a block fall on one employed in the unloading, is liable therefor." *Connors vs. Great Northern Elevator Co.*, 72 N. E. 1140; 180 N. Y. 509.

See also:

Johnson vs. Spear (Mich.), 42 N. W. 1092.

Fell vs. Rich Hill Coal Min. Co., 23 Mo. App. 216.

WAS THE DYNAMITE FURNISHED BY PLAINTIFF IN ERROR EXTRA HAZARDOUS OR DEFECTIVE?

That is not a question of law but of fact for the jury, and the jury's finding is final, if supported by any evidence. Plaintiff had been employed only two days and a half when the injury occurred, and had not seen the dynamite and had nothing to do with it. He said:

"Q. (Mr. Lund) At the time you came there on the job, Mr. Johnson, at section 123, and from the time you commenced to work until the day of the explosion, what did you have to do with or did you handle any dynamite there?

A. No.

Q. Did you see the dynamite?

A. No.

Q. Did you at any time know there was any defect in it?

A. I didn't know—I didn't see the dynamite, only that day I seen the box that Riley carried in.”
(Rec. 67.)

But Fred Johnson and Herbert Carson had seen the dynamite and testified to its condition and appearance. Mr. Carson said:

“Q. What was the date on the powder?

A. The date on the cases was May, 1907. * * *

Q. And this was May, 1910?

A. Yes.

Q. —that you were using it? * * *

A. Yes.

Q. I will ask you now to state what was the appearance of the dynamite which you saw in the powder magazine?

A. Well, some of this powder appeared to be bleached, and in places where I saw the sticks broken it looked discolored.

Q. And what as to dryness or moisture?

A. Well, it appeared to be moist—very moist, some of it on the outside.

Q. Outside of the wrapper?

A. Yes.

Q. What was the nature of the moisture as to whether it was watery moisture or oily moisture?

A. It appeared to be an oily substance." (Rec. 78-79.)

Fred Johnson testified:

"Q. Did you see the dynamite that was used there at the camp before the explosion?

A. Yes, I seen some of it, yes. * * *

Q. And did you see the date stamped on the dynamite?

A. Yes, I see the stamp.

Q. What was the date and the stamp on it?

A. There was a twenty and a fifteen—15th of May, 1907." (Rec. 113.)

John A. Johnson came on the job two days after the explosion (Rec. 117-118). The same dynamite was in the magazine on the station when he came. None had been used in the meantime and no new dynamite had come in (Rec. 113, 114). He said:

"Q. Did you see the dynamite that was in the powder house?

A. I saw some of it.

Q. What was its condition?

A. Well, it was pretty bad looking.

Q. In what way did it look?

A. It looked—the papers were yellow on the outside and spotted.

Q. Was there any stamp or date on it?

A. Yes, sir.

Q. What was the date?

A. 15th of May, 1907.

Q. And where was that stamp?

A. On the side of the paper.

Q. On the dynamite stick?

A. On every stick, yes." (Rec. 118.)

The jury having found the issues for the plaintiff, as far as the inquiry in this court is concerned, it is an established fact that the dynamite furnished by defendant for use on this station was nearly three years old, was spotted and discolored and the wrappers covered with an oily substance. That is particularly so in this case, where defendant stood mute and offered no evidence, although the evidence showed that it had a resident engineer on the place who inspected the dynamite, and defendant's agents must have known where it came from, where it had been kept during the three years, and how it had been kept.

Having established the age of the dynamite and its appearance, Mr. Laucks, a chemist and mining engineer, was called as an expert, and testified that dynamite consists of nitro-glycerine mixed with

some absorbent substance, such as wood pulp, and that the nitro-glycerine is the explosive part. He said:

“Q. What is the purpose of mixing the nitro-glycerine with the absorbent?

A. The purpose is to render it safe to handle. That is, pure nitro-glycerine is a very hard substance to handle with safety and to ship any distance, but when it is absorbed by some inert material and absorbed by some powder it becomes much more safe to handle and to ship about the country and so on.

Q. What can you say as to whether nitro-glycerine mixed in that way with some other substance in a solid form is less susceptible to shock causing explosion than in its pure state?

A. It is much less susceptible, yes.

Q. How does time affect this mixture, Mr. Laucks?

A. Well, time affects it generally because the condition that affects nitro-glycerine. The longer a time it has been stored, the more time those conditions have to act on the nitro-glycerine. To make my point clear, you take, for instance, the case of moisture; in a moist climate dynamite has a tendency to take up moisture and to replace nitro-glycerine. Now the longer that goes on—the longer it has been stored in a moist climate, of course the more that effect is pronounced.

Q. And what is the result of that?

A. Well, the result of it is that the dynamite that has been stored for some time in a moist atmosphere, the nitro-glycerine comes to the surface,

either underneath the wrapper or gets through the wrapper and collects in drops, or sweats, as the miners call it, and in that condition it is very dangerous, because you have then free drops of nitroglycerine there, and it is a well known fact that it is a great deal more dangerous in that condition and that a great many accidents happen due to the thawing and one thing and another.

Q. What can you say as to whether dynamite two or more years of age is reasonably safe to handle?

A. Well, that depends a great deal upon how it has been stored and the precautions that have been taken in storing it, but in most cases I should say that I would hesitate to use dynamite that was two years old unless I knew exactly how it had been stored and all its past history.

Q. State whether or not an inspection of the dynamite by a person understanding it will—persons understanding such things—will give information as to its condition?

A. It will, yes.

Q. State whether or not it would be reasonably safe to give out for use dynamite two years old or more without an inspection? * * *

A. I don't think it would be reasonably safe. I would not do it myself, and I don't believe it would be safe.

Q. If it appears that the wrapper of the dynamite is moist, with an oily moisture, what does that indicate, Mr. Laucks?

A. Well, I suppose by oily moisture there you mean an oily substance or an oily liquid?

Q. Yes.

A. It most certainly indicates nitro-glycerine. At least, from your question it would indicate nitro-glycerine, because that is the only thing in dynamite that is of an oily nature.” (Rec. 100, 101.)

Plaintiff in error insists that the dynamite must have been safe, because no accident had happened in its use before, and because some remaining sticks in the box was left in the debris unexploded. The explosion took effect in the bottom of the hole and broke the rock and the men at the mouth of the hole were not killed (Rec. 89). The expert explained it as follows:

“Q. Does dynamite sometimes get to such a state that it won’t explode at all?

A. It does when it is frozen.

Q. If those remaining sticks in the box were frozen they would not be liable to explode by the explosion in the hole, would they?

A. Dynamite that is frozen is very hard to explode.

Q. Assuming that the box was not as stated by counsel in front of the hole, but that it was alongside of the hole and the explosion took place in the hole, the force of the explosion taking effect away down at the bottom of the hole and loosening the rock, and that two men in front of the hole that were doing the loading were not killed, what would you say as to why that powder or dynamite in the box was not exploded?

A. Well, there are several possibilities there. One that it is frozen and the other that it is good dynamite and got the full force of the blow, (should be: did not get the full force of the blow), and the other is that it did not get the full force of the blow in such a way that it would explode it. What I mean is to set off an explosion requires a certain kind, with good dynamite requires a certain kind of blow."

There was evidence from which the jury could find that the powder remaining in the box did not get the full force of the explosion.

"Q. Where was Riley and his partner standing in reference to that hole?

A. Right over the hole.

Q. Right at the opening of the hole?

A. Yes.

Q. And this hole blew up, struck them first and then buried you?

A. No, sir, the weight of the muck came on to us. That hole broke sideways, and it all came over onto us fellows pretty near." (Rec. 90.)

"Q. Riley was not killed?

A. No, sir." (Rec. 89.)

It is insisted that the dynamite was good because no premature explosion had happened before that time. The evidence is silent as to that, and it is a mere assumption. In *Connor vs. Great Northern Elevator Co.*, *supra*, a rope in a tackle broke

because defective. It is no argument to say that the rope could not have been defective because it had not broken before. Can a man charged with murder defend himself on the ground that he had not killed anyone before.

Against the positive testimony of the witnesses that the dynamite was dated May 15, 1907, that the wrappers were discolored and wet with an oily substance, indicating the presence of free nitro-glycerine, plaintiff in error's argument might be addressed to the jury but not to the court, for it is a question of fact and not of law.

DID THE EXTRA HAZARDOUS CONDITION OF THE DYNAMITE CAUSE THE PREMATURE EXPLOSION.

While defendant in error and another man were engaged in drilling in the tunnel, one Riley and another man came in to load a hole with dynamite, and while they were so doing the explosion occurred in the hole. Plaintiff in error insists in its brief that they were ramming the dynamite down, but that is not so. The evidence shows that they were loading it with a wooden loading stick in the ordinary and careful manner.

The witness Carson testified:

“Q. And now tell us—tell the jury what you saw of that explosion and how it took place and all about it?

A. When we went to work in the tunnel, Mr. Riley said he had a hole he had to blast before he could drill his lifter. He was working in the heading with us and we had started to drill our lifter on the left-hand side and we were working at one side and Mr. Riley came in with his partner and the powder and the tamping stick to load his hole.

Q. Go ahead.

A. And I saw him start to load the hole and was watching him, because we all had to go when he had it prepared to blast. * * *

Q. Tell us how he loaded it?

A. He used his tamping stick and his partner stood there and took the powder and split them—split the sticks and handed it to Riley, and he took his tamping stick and shoved them in the hole?

Q. What was the tamping stick made of?

A. Made of wood.

Q. What is the ordinary and proper method of loading dynamite into a hole?

A. I never used any other method than that.

Q. And then what happened?

A. Well, I can't altogether recollect what happened. I got knocked out. The explosion took place and buried me and buried two other fellows, and I got into a little cavity in the wall. After that I don't really know what happen for some little time.” (Rec. 76, 77.)

This witness used the term "powder," but he meant dynamite.

"Q. By powder you mean dynamite?

A. Yes. Giant powder." (Rec. 77.)

Fred Johnson also saw the loading, and said:

"Q. Can you tell us in any way what you saw about that explosion and how it came about?

A. Well, I saw them come in with the powder—Riley came in with the open box of powder—I am not sure, about three-quarters of a box—and he had his partner in there, and he comes in with the box of powder and the loading stick—a wooden stick.

Q. Who did you say came in there with the powder and the loading stick?

A. Riley. * * *

Q. And who was with him?

A. He had a box of powder on one side and a loading stick—a wooden stick.

Q. The wooden loading stick in the other?

A. Yes.

Q. And what did he start to do?

A. His partner was in there and they started to clear out the hole—they cleared out a little dirt out first.

Q. And in what manner were they loading—how were they loading that hole?

A. His partner was cutting up the powder with a knife and he was behind and handed it to him, and he put the powder in the hole and pushed it in with the loading stick.

Q. And what happened—what took place?

A. Well, I was sitting looking like that, working with the drill, and he gave him one stick after the other and put it in, and I looked, I know, as I was turning the drill, and I see come a white light come and the explosion come. As soon as the explosion come I don't know anything for the time.

* * *

Q. Now at the time you saw that white flash of the explosion, what was Riley doing with the loading stick?

A. He was putting in powder in the hole with the loading stick.

Q. Was he using any unusual force, or was he doing it in the ordinary way?

A. Eh?

Q. You don't understand me—was Riley putting it in with any unusual force—how was he loading it?

A. No, he was putting it in easy with the stick, putting it in easy." (Rec. 111, 112.)

Not much ramming about that. The expert, Laucks, testified as to the proper method of loading dynamite as follows:

"Q. Tell the jury what is the ordinary, proper and careful manner of loading dynamite into a hole in a mine or tunnel?

A. The proper manner is to slip (slit?) the cartridges, shove them in the hole with a wooden stick, using no metal whatever, and to press them carefully and tamp them—not by hard blows but by pressure alone." (Rec. 103.)

Plaintiff in error insist that the evidence failed to show any defect in the powder and that the explosion was an unexplained mystery, and cites cases to the effect that negligence is never presumed. I don't question the law; the mistake is as to the facts. Counsel repeats again and again that the men were ramming the dynamite into the hole. It is not a fair statement, because not only unsupported by the evidence but directly against the evidence. Mr. Carson, a miner of many years, described the method of loading employed by the men at the time and declares: "I never used any other system than that." (Rec. 77.)

Fred Johnson said that he was looking at the men loading and saw the white flash of the explosion, and that they were shoving the dynamite in easy and not using any force. * * * "No, he was putting it in easy with the stick, putting it in easy."

The method of loading being established, and the appearance and age of the dynamite being established, the expert was asked the following question and gave the following answer:

"Q. Now I will ask you this question: Assume as a fact that some men are working in a tunnel on railroad construction; and a box of dynamite is brought into the tunnel; with the sticks to

be used in loading the hole, and two men are loading it, one man is cutting open the wrappers, and the other is shoving the powder down into the hole with a loading stick, consisting of wood, in the ordinary manner of loading dynamite, and while in the act of doing so an explosion is caused by the dynamite in the hole. The dynamite that is used in loading, it being more than two years old, that the wrappers are moist with an oily moisture, discolored—what would you say was the cause of the explosion?

* * *

A. If the loading of the hole was properly done—your question was if the hole was loaded in the usual manner, I believe?

Q. By the use of the loading stick, one man cutting up the powder and the other shoving it in in the usual and careful manner of loading powder, with the facts which I have assumed.

A. If the loading was properly done, I should say that the probability was all in favor of—in fact, there is nothing else—there is no other answer to that question except that the dynamite was at fault.” * * *

“Q. What can you say, if there is anything mysterious about dynamite, or something that no one can understand—what would you say as to that?

A. No, there is nothing mysterious about dynamite. * * *

Q. A premature or unexpected explosion of dynamite will not occur without some cause?

A. Most certainly, there must be some cause for it.” (Rec. 101-103.)

The testimony not only showed that the dynamite in the powder house was defective, but the

dynamite used by Riley at the time of the premature explosion was defective. Fred Johnson testified:

Q. You went back in again?

A. Yes, but I could not tell very well, but I was there after they got the men out.

Q. And what did you see or notice in the muck?

A. I picked up about eight or ten sticks, I can't say exactly, of powder.

Q. Of dynamite?

A. Yes.

Q. Where had those sticks of dynamite come from, if you know?

A. They was left in the box.

Q. From which the men were loading the hole?

A. Yes, where they were loading the hole, they were left in the box.

Q. What was the appearance of those sticks, as to whether they were the same that you saw that were in the box when they brought the box in?

A. Yes. I saw the box when they brought them in. * * *

Q. What color were the wrappers on this powder?

A. It was spotted." (Rec. 125, 126.)

WHAT WAS THE CONDITION OF THE DYNAMITE WHEN
IT LEFT THE POSSESSION OF THE KATALLA COM-
PANY.

The argument of plaintiff in error, under this subdivision, is based upon conjecture and unwarranted assumptions. If the Katalla Company furnished extra hazardous dynamite for the use of the men building its road, it is both legally and morally liable therefor, whether Heney or Rollin are dead or alive. It says Heney's superintendent discovered no defect in the dynamite when he delivered it to the men, and cites transcript of record, p. 72. Turning to the page cited, the court will see that all that the superintendent said was that he did not know that there was any defect in the dynamite, not that there was not any. It nowhere appears that he made any examination, for he had a right to believe that the dynamite furnished was not extra hazardous, in the absence of notice to the contrary. Again, it is said the superintendent discovered nothing wrong with it. How can counsel make such a statement when there is not an iota of evidence that he examined it.

While the superintendent said he shipped dynamite to the particular station in April, March and

February, he admits that he had stated that it was shipped up in April. But whether it was shipped in in April or February, it was then over two years old, and while in Heney's hands it was not exposed to any condition which would render it extra hazardous (Rec. 129). And while in the hands of the station men at the station, it was properly stored in a powder house constructed for that purpose.

John A. Johnson testified:

“Q. What did you find they kept their dynamite in?

A. They had a log cabin that was called the powder house.

Q. Built of logs?

A. Built of logs and boards.

Q. In what way was it protected from the weather?

A. It was boards on the ends and canvas on the top, boarded tight with a made door.” (Rec. 178.)

Witness Carson said (Cross-examined):

“Q. Where it got the water in it, whether it laid out in the sun and got bleached, you don't know?

A. No.

Q. You don't know whether it got bleached after it came into the possession of Sam Rollin or not, do you?

A. Well, it could not very well get bleached there.

Q. Well, you don't know anything about it, do you?

A. It was—

Q. You don't know anything about it?

A. No, only what I saw there." (Rec. 80.)

It will be noticed that the witnesses said the wrappers were wet with an oily substance. Counsel in their brief ignores that statement and substitutes water. Throughout its brief the argument is based upon incorrect facts, and I can only refer the court to the record.

Now, then, it is undisputed that whether the dynamite was delivered in February or April it was more than two years old then, a fact which alone made it dangerous to handle, according to the expert, and while in transit it was not exposed, and while in the station it was stored in the powder house and "could not very well have got bleached there," according to the testimony. Such being the testimony, it was competent for the jury to find that the dynamite was old and extra hazardous when it left the possession of the Katalla Company, particularly because its officers and agents were silent as the grave and refused to testify. The com-

pany had a resident engineer on the station, Mr. Wingate (Rec. 129). He knew the condition of this dynamite and directed the men not to use it any more (Rec. 121). The company's agents must have known the age of that powder, where it had been during the two years and nine months before it was given to the men to use and what its condition was, for it could have been ascertained by an examination (Rec. 101) by an experienced man. They knew of the terrible accident at the time; the company was charged in the complaint with negligence in furnishing this dynamite more than a year before the trial, and yet its every officer and agent stands mute and has not a single word to offer in defense, and the truth must have been known to them. Had the dynamite been of proper age and condition and without defects when it left the hands of the company, its officers, agents and resident engineer in charge of that station should have known it, and yet they stood absolutely silent.

In *Aragon Coffee Co. vs. Rogers* (Va.), 8 Am. & Eng. Ann. Cases 623, the court says:

“In *Bastrop State Bank vs. Levy*, 106 La. 586, 31 So. Rep. 164, the court said:

“ ‘Judicial tribunals are established to administer justice between litigants, and the first and

more important step to that end is the ascertainment of the truth of the controversies which come before them. It is only when the truth is ascertained that the law can be properly applied in the just settlement of disputes. Litigants owe the duty of assisting in every legitimate way in the elucidation of the truth. When defendant can by his own testimony throw light upon the matter at issue, necessary to his defense and peculiarly within his own knowledge if the fact exists, and fails to go upon the witness stand, the presumption is raised, and will be given effect to, that the fact does not exist.'

"A man of ordinary intelligence must know that his failing to appear, when he has a strong motive to appear, would be evidence against him; if he relies upon his ability to disprove the motive imputed he takes the risk, but he leaves the effect of his conduct as a matter of evidence for the opposite side to go to the jury."

DID THE COMPANY OWE ANY DUTY TO JOHNSON?

Under this caption plaintiff in error argues that it had a right to furnish Heney with extra hazardous dynamite. That it is not like selling naphtha labeled oil or a poisonous drug labeled as an innocent one. That it had agreed to furnish dynamite, and dynamite it furnished. Counsel overlooks the fact that one receiving dynamite, whether by purchase or otherwise, has a right to expect that it is in ordinary condition and not extra hazardous. in absence of notice to the contrary. One who sells

dynamite containing free nitro-glycerine without notice violates every rule of humane conduct. Heney's superintendent did not know there was anything wrong with the dynamite, hence he could have had no notice. As to the duty to all the world, see

Weiser vs. Holzman, 33 Wash. 87.

Beal vs. City, 28 Wash. 604.

Shubert vs. Clark, 51 N. W. 1104.

Waters-Pierce Oil Co. vs. Deselms, 212 U. S. 159.

PROXIMATE CAUSE.

Plaintiff in error makes this statement in its brief, p. 37:

"The sticks of dynamite and the boxes in which they are contained, if we are to believe the evidence of the witnesses Carson and Johnson, had stamped on them the date May 15th, 1907, and the wrappings in which the dynamite was held were discolored and covered with an oily moisture, which indicated the exudation of nitro-glycerine. If these conditions showed anything, they showed the age and deterioration of the dynamite."

The jury placed credence upon the testimony of the witnesses named, and that should establish the fact testified to, and that has been my contention throughout, but in face of this admission, what about counsel's prior argument that there was noth-

ing wrong with the powder and the premature explosion was an unexplained mystery. But now it is argued that this condition was apparent and Heney and the station men accepting it in this condition the responsibility was shifted from the company to the contractor. Against this contention it appears that Heney did not know of the defect, and an ordinary laborer or miner is not charged with knowledge of the chemical properties of dynamite.

Mr. Carson said:

“Q. It is an indication of defective powder though, is it?

A. Well, I am not an expert.” (Rec. 90.)

In the case of *Rillstone vs. Mather et al.*, 44 Fed. 743, the court held that a laborer was not chargeable with knowledge of the properties of dynamite. The court said:

“Dangers which are not obvious to the common understanding, but known only to those educated and peculiarly informed upon the subject—(p. 744).

Part of the syllabus reads:

“There was conflicting evidence as to how the accident was caused, and it might have been caused by the way the plaintiff handled the caps. *Held*, that it was proper to submit the case to the jury.”

This case was carried to the United States Supreme Court, 156 U. S. 398, and it was affirmed.

Part of the syllabus reads:

“In all occupations attended by great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, and neglect to provide such readily attainable appliances is proof of culpable neglect.”

That being true as to use of dynamite in ordinary condition, human feeling revolts at the doctrine claimed by plaintiff in error that a contractee had a right to furnish extra hazardous dynamite to the contractor for use by him on the works without giving any notice or warning to the men. And that the act of the contractor in receiving it and using it “insulated” the negligence of the contractor.

In the case of *Florsheim vs. Dullaghan*, 58 Ill. App. 593; the syllabus reads:

“A person cannot contract with another to do an act which necessarily involves the doing of an injury to a third person and escape liability under a plea that there is an intervention of an independent contractor.”

In conclusion: Defendant in error is only one of the sons of Martha, it is true, but he had a sound body given to him by our common father, and with that he supported himself and those depending upon him at the hardest manual labor. He has been deprived of it and suffered pain beyond words through the grossest and most culpable negligence of the offi-

cers and agents of plaintiff in error. He went on the work with a sound body; he returned to his wife and children a cripple for life. What home coming that was. I have seen so much heartbreaking suffering by reason of the killing and crippling of laborers, and, in my opinion it is in almost every instance due to the fault of those in authority, and often with indifference brought about by the vicious system of liability insurance in vogue. While the human soul, as Plato says, is a constant battleground between good and evil, the court must always be on the side of good and against evil, and if a person will not do right, he should be made to do so, for that is best even for him.

Respectfully submitted.

MARTIN J. LUND,
Attorney for Defendant in Error.

No. 2161

United States
Circuit Court of Appeals
For the Ninth Circuit

E. L. CASEY,

Plaintiff in Error,

vs.

THE BARBER ASPHALT PAVING COMPANY,
a Corporation,

Defendant in Error.

Transcript of Record

Upon Writ of Error to the United States District Court
for the Eastern District of Washington
Southern Division

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JUL 23 1912

No. _____

United States
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In the District Court of the United States for the Eastern District of Washington, Southern Division.

E. L. CASEY,

Plaintiff,

vs.

THE BARBER ASPHALT PAVING COMPANY,
a Corporation,

Defendant.

No. 268.

NAMES AND ADDRESSES OF ATTORNEYS OF
RECORD.

BENNETT & SINNOT, The Dalles, Oregon, and J.
G. THOMAS and W. A. TONER, Walla Walla,
Washington,

Attorneys for Plaintiff.

POST, AVERY & HIGGINS, Exchange National Bank
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GOSE & GOSE, Walla Walla, Washington,

Attorneys for Defendant.

*In the Superior Court of the State of Washington, for
Walla Walla County.*

E. L. CASEY,

Plaintiff,

vs.

THE BARBER ASPHALT PAVING COMPANY,
a Corporation,

Defendant.

COMPLAINT.

Comes now the plaintiff, and complaining of defendant, alleges:

I.

That said defendant is a corporation duly organized and doing business in the State of Washington, and was such corporation at all the times and dates hereinafter mentioned, and as such corporation was engaged in the transaction of business in the County of Walla Walla, in the State of Washington, and in the business of mixing, grinding and manufacturing asphalt paving and the material therefor in the City of Walla Walla, in said County and State.

II.

That on the 6th day of August, 1909, the said defendant was operating a certain mill, factory and workshop in the City of Walla Walla, in said County and State, for the purposes of mixing, grinding and manufacturing Asphalt paving, and was at said time engaged in the mixing, grinding and manufacturing of said paving at said place.

III.

That on said date and prior thereto the plaintiff was an employee of the defendant, and was working under the direction and authority of the defendant with, in, on, around and about said mill, factory and workshop, and in assisting in the operation thereof.

IV.

That prior to and at said time the defendant negligently and carelessly and in violation of its duty to this plaintiff, and to its other employees, and in violation of the laws of the State of Washington, caused and permitted a certain revolving shaft and coupling, which was a part of the machinery of said mill, factory and

workshop, to be left insufficiently and entirely unguarded and unprotected, and in such a condition that the employees of such mill, factory and workshop, including the plaintiff, was constantly liable to come in contact with said shaft and coupling while in the performance of their duties; and negligently and carelessly failed to provide reasonable or any safeguards therefor, although it was entirely practicable to guard and protect the same, and although the same could have been at said time, effectively and perfectly guarded with all due regard to the ordinary use of such machinery and appliances, and without in any way interfering with the ordinary use of the same.

V.

Plaintiff further alleges that said defendant at said time and prior thereto, negligently and carelessly left said machinery and said shaft and coupling in a defective and dangerous condition, with a certain cotter pin unnecessarily and dangerously projecting therefrom in such a position so as to be likely to catch and injure employees working about the same, and that said defendant totally and wholly and negligently and carelessly failed to guard or protect said machinery and projecting cotter pin or provide any reasonable safeguard to prevent the plaintiff and other employees working about said mill from being caught therein, although the same could have been effectively guarded with due regard to the ordinary use of such machinery and appliances, and without interfering in any way with such use, and although

the said plaintiff and other employees were liable to come in contact with the said machinery in the performance of their duties as aforesaid.

VI.

That by reason of the negligence and wrongful act of the defendant in leaving said shaft and coupling in a dangerous and defective condition with the said cotter pin projecting therefrom, as aforesaid, and by reason of its negligence in failing to provide any safeguard therefor, or to guard the same in any way, as aforesaid, the plaintiff on said 6th day of August, 1909, while in the performance of his duty as such employee of the defendant in, around and about said mill, factory and workshop, and while engaged in the operation of the same and in the manufacturing of Asphalt therein, as aforesaid, was caught by said projecting pin and by said unguarded shaft and coupling and was greatly bruised, mangled, burned and injured in his body and person, and his bones broken and his muscles torn, and whereby plaintiff has suffered great physical and mental pain and agony, and has been ever since incapacitated from performing his ordinary work as a machinist, or any manual labor whatever, and will be so incapacitated for all time to come, and whereby plaintiff has been crippled and disfigured, and will be so permanently crippled and disfigured, and has not been, and will not be able to enjoy the ordinary comforts and pleasures of life, and whereby he has suffered damages to the extent of Seven Thousand Five Hundred Dollars (\$7,500.00).

VII.

That on the 28th day of January, 1910, and within six months from the occurrence of such injury, the plaintiff duly served upon the defendant and gave to the defendant, the following notice of the time, place and cause of such injury, which notice was in writing and signed by the person injured, to-wit: the plaintiff herein:

NOTICE:

TO THE BARBER ASPHALT PAVING COMPANY:

You are hereby notified, that on the 6th day of August, A. D. 1909, at the City of Walla Walla, County of Walla Walla and State of Washington, E. L. Casey, the undersigned, was injured while in your employ at and about a certain mill, factory and workshop, being operated by you, at or near the intersection of Ninth and May Streets in the said City of Walla Walla, for the purpose of mixing, grinding and manufacturing Asphalt Paving, for the construction of a pavement in said City; and that said injury was caused by the use of a dangerous, defective, uncovered and unguarded coupling, shaft and projecting pin and fastening upon said machine, by which the plaintiff, undersigned, was caught by said shaft and coupling and was greatly bruised, mangled, burned and injured and his bones broken and muscles torn, for all of which injuries the undersigned expects to hold you, the said company, responsible.

Dated this 25th day of January, A. D. 1910.

(Signed) E. L. CASEY.

WHEREFORE, the plaintiff prays judgment against said defendant for said sum of Seven Thousand Five

Hundred Dollars, and for his costs and disbursements made and expended herein.

J. G. THOMAS and W. A. TONER and
BENNETT & SINNOTT,

Attorneys for Plaintiff.

State of Washington,
County of Walla Walla,—ss.

I, E. L. Casey, being first duly sworn, do say on my oath that I am the plaintiff above named; that the foregoing complaint is true as I verily believe.

(Signed) E. L. CASEY.

Subscribed and sworn to before me this 29th day of
March, A. D. 1910.

(Signed) J. G. THOMAS,

Notary Public in and for the State of Washington, residing at Walla Walla.

Filed April 30th, 1910.

State of Washington,
County of Walla Walla,—ss.

I, James Williams, County Clerk of the County of Walla Walla, State of Washington, and ex-officio Clerk of the Superior Court of the State of Washington for Walla Walla County, do hereby certify that the within and foregoing are full, true and correct copies of the originals, and of the whole thereof, as the same are now on file and of record in the within entitled action, in my office and custody, and said cause has been ordered removed to the Circuit Court of the United States for the Eastern District of Washington.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of Said Superior Court this 3rd day of May, 1910.

(Seal) JAMES WILLIAMS,
County Clerk and ex-officio Clerk of the Superior Court.

Endorsements :

Portion of Transcript. Complaint. Filed June 4-10.
F. C. Nash, Clerk. By E. E. Wright, Dep.

In the Circuit Court of the United States, for the Eastern District of Washington, Southern Division.

E. L. CASEY,

Plaintiff,

vs.

THE BARBER ASPHALT PAVING COMPANY,
a Corporation,

Defendant.

No. 268.

ANSWER.

Comes now the defendant and for answer to plaintiff's complaint herein,

1. Denies each and every allegation and thing contained in paragraph 1 in said complaint, except that it is a corporation and is doing business in the State of Washington.

2. Denies each and every allegation and thing contained in paragraph 2 of said complaint, except that on or about the 6th day of August, 1909, a portable machine or apparatus for mixing asphalt was used in so doing in the City of Walla Walla, Washington.

3. Denies each and every allegation and thing contained in paragraph 3 in said complaint, except that on

said last named date and prior thereto the plaintiff was an employee of the defendant, working around and about said asphalt mixing machine.

4. Denies each and every allegation and thing contained in paragraph 4 in said complaint.

5. Denies each and every allegation and thing contained in paragraph 5 of said complaint.

6. Denies each and every allegation and thing in paragraph 6 of said complaint contained, except that defendant is informed and believes that on or about the said 6th day of August, 1909, that the plaintiff was injured in and about said mixing machine and except further the allegations therein as to the extent of plaintiff's alleged injuries, as to which allegations this defendant denies any knowledge or information sufficient to form a belief.

II.

For a further and affirmative defense herein the defendant alleges that if the plaintiff was injured in the manner alleged in his complaint and at the time therein alleged such injury was caused and brought about by his own carelessness and neglect and by reason of his contributory negligence and not by reason of the carelessness or negligence of the defendant, or anyone for whose acts the defendant is responsible.

III.

For a second and further affirmative defense herein defendant alleges that in entering upon the employment in which he was engaged at the time of said alleged accident, the plaintiff assumed as a part of said employment,

all of the risks and dangers incident thereto and it was part of the considering entering into his contract of employment with the defendant that he assume all risks in and about his work in connection with said mixing machine or apparatus.

WHEREFORE, because of the foregoing the defendant prays that the plaintiff take nothing herein and that it have its costs and disbursements herein incurred.

(Signed) T. P. & C. C. GOSE,

(Signed) POST, AVERY & HIGGINS,

Attorneys for Defendant.

State of Washington,
County of Spokane,—ss.

A. G. AVERY, being first duly sworn, on oath, deposes and says that he is one of the attorneys for the defendant in the above entitled cause, and makes this verification for and in its behalf because there is no officer of said corporation within said judicial district; that he has read the foregoing ANSWER, knows the contents thereof and that the same is true as he verily believes.

(Signed) A. G. AVERY.

Subscribed and sworn to before me this 25th day of June,
1910.

(Signed) A. E. RUSSELL,

(Seal.)

Notary Public for the State of Washington, residing
at Spokane.

Endorsements: Service of the within answer admitted this 28th day of June, 1910, at Walla Walla, Washington. W. A. Toner, one of the Attorneys for Plaintiff. Filed July 5, 1910. F. C. Nash, Clerk. By E. E. Wright, Deputy.

In the Circuit Court of the United States for the Eastern District of Washington, Southern Division.

E. L. CASEY,

Plaintiff,

vs.

THE BARBER ASPHALT PAVING COMPANY,
a Corporation,

Defendant.

REPLY.

Comes now the plaintiff, and replying to the new matter in defendant's answer, denies and alleges :

I.

Denies each and every allegation and thing contained in Paragraph II of said affirmative answer.

II.

Replying to Paragraph III of said affirmative answer, plaintiff denies each and every allegation and thing alleged in said paragraph.

III.

Replying to the whole of said affirmative answer, the plaintiff denies each and every allegation thereof.

WHEREFORE, plaintiff prays judgment as in his complaint.

J. G. THOMAS and W. A. TONER,
BENNETT & SINNOTT,

Attorneys for Plaintiff.

State of Washington,
County of Walla Walla,—ss.

I, E. L. Casey, being first duly sworn, say on my oath that I am plaintiff above named, and that the foregoing reply is true as I verily believe.

(Signed) E. L. CASEY.

Subscribed and sworn to before me this 12th day of
August, A. D. 1910.

(Seal) (Signed) J. G. THOMAS,
Notary Public in and for the State of Washington, re-
siding at Walla Walla.

Due and legal service of the foregoing Reply upon me at Walla Walla, Washington, this 12th day of August, 1910, is hereby acknowledged.

(Signed) T. P. GOSE,
Of Attorneys for Defendant.

Endorsed:

REPLY—Filed August 18, 1910. F. C. Nash, Clerk.
By E. E. Wright, Deputy.
*In the Circuit Court of the United States for the Dis-
trict of Washington, Southern Division.*

E. L. CASEY,

vs.

BARBER ASPHALT COMPANY,
a Corporation,

No. 268.

VERDICT.

We, the jury in the above entitled cause, find for the

plaintiff, and assess the amount of his damages at the sum of Seventy Five Hundred Dollars.

(Signed) R. P. HILL,

(Endorsed.)

Foreman.

VERDICT.

Filed October 9th, 1911.

FRANK C. NASH, *Clerk.*

In the Circuit Court of the United States for the Eastern District of Washington, Southern Division.

E. L. CASEY,

Plaintiff,

vs.

THE BARBER ASPHALT PAVING COMPANY,
Defendant.

Now on this day comes the plaintiff and moves for a judgment on the verdict heretofore rendered and entered in said cause; the plaintiff appearing by Thomas & Toner, and A. S. Bennett, his attorneys, and the defendant appearing by A. G. Avery and Gose & Gose, its attorneys.

And thereupon it is ordered, adjudged and considered that the plaintiff have and recover from the defendant the sum of Seven Thousand Five Hundred (\$7,500.00) Dollars and his costs and disbursements made and expended herein, and that execution issue therefor, to all of which the defendant excepts and the exception is allowed.

Done this 9th day of Octboer, A. D. 1911.

(Signed) FRANK H. RUDKIN,

Judge.

Indorsements: Judgment. Filed October 9, 1911.

F. C. NASH, *Clerk.*

By E. E. WRIGHT, *Deputy.*

AND AFTERWARDS, to-wit: on the 9th day of October, 1911, the same being the eighth day of the regular June, 1911, term of said Court, Present: The Honorable FRANK H. RUDKIN, United States District Judge for the Eastern District of Washington, Presiding, the following proceedings were had in said case, to-wit:

In the District Court of the United States, Eastern District of Washington, Southern Division.

E. L. CASEY, *Plaintiff,*

vs.

BARBER ASPHALT PAVING COMPANY,
a Corporation,

Defendant.

No. 268.

RESUME AND CONCLUSION OF TRIAL AND
VERDICT AND MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT.

Now, at this day, comes the above named plaintiff and his attorneys as of yesterday, and the above named defendant by its attorneys as of yesterday, and the jury impaneled herein being present and answering to their names, the trial of this cause is resumed in the adducing of rebuttal testimony on behalf of the plaintiff until the close of all the testimony in the case. Whereupon the jury, after hearing the arguments of respective counsel and the instructions of the court, retired at 2:10 o'clock P. M., under the charge of properly sworn officers of the

Court, to consider of their verdict. And subsequently, on this same day, at 4:10 o'clock P. M., the said jury impaneled herein having heard the evidence adduced, the arguments of counsel and the instructions of the court, and having heretofore retired from the court room to consider of their verdict, now come into court, and, after answering to their names, all being present in their box, present to the Court the following verdict, to-wit: "We, the jury in the above entitled case, find for the plaintiff, and assess the amount of his damages at the sum of Seventy Five Hundred Dollars. R. P. Hill, Foreman," which verdict was received by the Court and ordered filed, and the jury discharged from further consideration of the case.

WHEREUPON, after the rendition of the above verdict as aforesaid, A. G. Avery, Esquire, of counsel for the defendant in the above-entitled case, moved the Court for a judgment in its favor notwithstanding the verdict, which motion is in words and figures following, to-wit:

"Grounds of Motion for a Judgment Notwithstanding the Verdict.

1. That the testimony and evidence adduced in the plaintiff's case did not, if true, constitute a cause of action against the defendant and a verdict was not warranted thereon.

2. The testimony adduced in the whole case shows that the plaintiff was not entitled to a verdict.

3. The testimony adduced shows that as a matter of law that the defendant is entitled to a verdict.

4. The evidence shows that the plaintiff was guilty of contributory negligence.

5. The evidence shows that the risk as to such dangers that brought about the plaintiff's injuries were assumed by him when he entered defendant's employ.

6. The complaint does not state a cause of action against the defendant."

(Signed) FRANK H. RUDKIN,
Judge.

Entered Circuit Court Journal, Volume 2 at page 173.

In the Circuit Court of the United States for the Eastern District of Washington, Southern Division.

E. L. CASEY,

Plaintiff,

vs.

THE BARBER ASPHALT PAVING COMPANY,

Defendant.

No. 268.

OPINION.

Thomas & Toner and Bennett & Sinnett, for plaintiff.

Post, Every & Higgins and Gose & Gose, for defendant.

RUDKIN, District Judge.

The defendant in this action is a corporation engaged in the business of laying asphalt pavement in roads and streets, as its name would indicate. In the prosecution of its work it maintains and operates certain machinery for the purpose of mixing, heating and preparing the crushed rock, sand, cement and asphalt out of which the pavement is made. This machinery is assembled on a car which does not differ materially from the flat car in common use. The plant consists of a mixer, a heater, and elevators for hoisting the materials, and the whole

is operated by a forty horse power gasoline engine connected up with the usual and customary cog wheels, shaftings, and other mechanical devices. The entire machinery is stationed on the car except the elevators, which extend to the ground beside the car. The six or eight men employed about the plant while in operation stand on platforms a few feet in width, constructed on each side of the car even with its floors or base. There are no sides to the car, no roof over it, except for the protection of parts of the machinery, and the whole cannot be said to be a building or enclosure of any kind, character or description. The car is moved about from place to place on the ordinary railroad tracks as required by the convenience or necessities of the defendant in the prosecution of its work. When desired for use at any particular point a sidetrack is constructed from the main track, the car is moved onto the sidetrack, and the temporary track is then removed from behind it, until it becomes necessary to return it to the main track for transportation to some other point. The temporary sidetrack is then replaced and connected up.

The foregoing is a brief but sufficiently accurate description of the plant or machinery in question for the purposes of this opinion.

The plaintiff was employed by the defendant to work around and about this machinery as an engineer in the City of Walla Walla, and while so employed came in contact with an unguarded coupling or shafting, and received severe injuries to his person, for which a recovery is here sought. The defendant challenged the legal sufficiency of the testimony to warrant a verdict against it,

first, by motion for a non-suit at the close of the plaintiff's testimony; second, by motion for a judgment in its favor at the close of all the testimony, and now, after verdict in favor of the plaintiff, by motion for judgment notwithstanding the verdict. The sole question presented by these several motions is this: Was this plant, machinery, or whatever we may style it, a *factory, mill or workshop*, within the meaning of the factory act, found in chapter eighty-four of the Washington Laws of 1905, as amended by chapter two hundred and five of the laws of 1907.

The titles of the several factory acts of this state have been identical, viz.; "An act providing for the protection and health of employees in factories, mills or workshops, where machinery is used, etc.; and while it was formerly held that the title formed no part of an act, it is now well established in both England and the United States that where the meaning of the body of an act is doubtful reference may be had to the title to remove the ambiguity or to supply an omission. This is especially true where there is a constitutional requirement that the subject or object of the act must be expressed in the title.

36 Cyc. 1133

Cons. of Washington, Art. 19, Sec. 2.

We need not dwell longer on this subject, however, for in the present instance the title and the body of the act are harmonious and consistent throughout.

Thus, section one of the Act of 1905, as amended by section one of the Act of 1907, declares, "That any per-

son, firm, corporation or association operating a factory, mill or workshop where machinery is used shall provide and maintain in use, * * * reasonable safeguards for all * * * shafting, coupling, * * and machinery of other or similar description, which it is practicable to guard, and which can be effectively guarded with due regard to the ordinary use of such machinery and appliances, and the dangers to employees therefrom, and with which the employees of any such factory, mill or workshop are liable to come in contact while in the performance of their duties. * * *”

Section two of the Act of 1905 provides, that “Every factory, mill or workshop where machinery is used and manual labor exercised by the way of trade for the purposes of gain within an enclosed room * * * shall be provided in each workroom thereof with good and sufficient ventilation,” etc.

Section three of the Act of 1905 provides that, “The openings of all hoist-ways, hatch-ways, elevators and well holes and stairways in factories, mills, workshops, storehouses, warerooms or stores, shall be protected where practicable, by good and sufficient trap-doors, hatches, fences, gates or other safeguards,” etc.

Section four of the Act of 1905, as amended by section two of the Act of 1907, provides that it shall be the duty of the Commissioner of Labor annually, and from time to time, to examine all factories, mills, workshops, warehouses, warerooms, stores and buildings, and machinery and appliances therein contained, to which the provisions of the act are applicable.

Section five of the Act of 1905, as amended by section three of the Act of 1907, provides, "That any person, firm, corporation or association carrying on business to which the provisions of the act are applicable, shall have the right to make written request to the Commissioner of Labor to inspect any factory, mill or workshop, and the machinery therein used, and any storehouse, wareroom or store, which said applicant is operating; * * *."

Section six of the act provides that the employee of any person, firm, corporation or association shall notify his employer of any defect in or failure to guard the machinery, appliances, ways, works, and plants, with which or in and about which he is working, and that the employee may complain to the Commissioner of Labor of any such defects or failure to guard such machinery.

Section seven of the Act of 1905, as amended by section four of the Act of 1907, provides, that whenever upon examination or re-examination of any factory, mill or workshop, store or building, or the machinery or appliances therein to which the provisions of the act are applicable, the property so examined and the machinery and appliances therein, conform in the judgment of the Commissioner of Labor to the requirements of the act, he shall issue a certificate, etc.; that a copy of the certificate shall be kept posted in a conspicuous place on every floor of all factories, mills, workshops, warehouses, warerooms or stores, to which the provisions of the act are applicable, and that if the provisions of the act have not been complied with, the Commissioner of Labor shall notify the person operating the mill, factory or workshop of that fact.

It will thus be seen that the act speaks of employees in factories, mills or workshops, and of employees of factories, mills and workshops; of factories, mills or workshops and the machinery therein used or therein contained, and of factories, mills and workshops, warehouses, warerooms, stores and buildings. Such language leaves little room for construction. The term "factory" has been defined as follows:

" 'Manufactory' and 'factory' are different forms of the same word. 'Manufactory' has been defined as 'in a house or place where anything is manufactured,' and 'factory' as a building, or collection of buildings, appropriated to the manufacture of goods.' But a manufactory is something more than a building. It includes not only the building, but the machinery necessary to produce the particular goods manufactured and the engines or other power necessary to propel such machinery. It seems, however, that mechanical power and machinery are not always essential to the existence of a factory. A single factory may include several buildings. And factory is not synonymous with mill, the former being a general term, while the latter is a specific term, and a factory may contain several mills. Various establishments have been held to be factories or manufactories under certain statutes, and the statutory meaning is sometimes wider than the common definition."

26 Cyc. 530.

"Mill" is defined by Webster as "A common name for various machines which produce a manufactured product, or change the form of a raw material by the continuous repetition of some simple action; as a saw *mill*; a stamp *mill*, etc."

Also as, "A building or collection of buildings with machinery by which the processes of manufacture are carried on; as a cotton *mill*; a powder *mill*; a rolling *mill*."

The same authority defines "shop" as, "A small establishment, * * * or building devoted to a particular line in a factory or large establishment, in which mechanics or artisans work; as a shoe shop; a car shop; a machine shop."

And "work shop" as "A shop where any manufacture or handiwork is carried on."

The only one of these definitions that would or could embrace the machinery in question is the definition sometimes given of a mill. The meaning of the word "mill," however, in this statute must be ascertained from the context.

"In accordance with the maxim *noscitur a sociis*, the meaning of a word used in a statute must be construed in connection with the words with which it is associated. Where several words are connected by a copulative conjunction, they are presumed to be of the same class, unless the contrary intention appears."

36 Cyc. 1118.

When therefore, the word "mill" is used in connection with the words, "factory," "work shop," "warehouse," "wareroom," "store" and "building" it can only mean "a building or collection of buildings with machinery by which the processes of manufacturing are carried on."

A statute of New Jersey provides, "That the belting, shafting, gearing and drums in all factories and workshops when so placed as to be dangerous to persons em-

ployed therein while engaged in their ordinary duties shall be securely guarded when practicable, if otherwise then a notice of its dangers shall be conspicuously posted in the factory or workshops."

2 Genst. p. 2345.

In *Griffith v. Mountain Ice Co.*, 65 Atl. 853, it was held that the provisions of this statute did not apply to shafting used in harvesting natural ice, the court saying:

"We think that the defendant's plant does not come within the statutory language 'factories and workshops,' not only because those words import a building in which the machinery is so placed as to be dangerous to operatives, but, also, and chiefly, because such words in their statutory context imply that the places to which they refer are those where machinery is employed in the work of fabrication; i. e., of making or manufacturing something. Such is the common meaning of a factory or workshop. Obviously the statute was not intended to apply to all cases in which shafting, belting and gearing were employed; for if that had been the legislative purpose, the limitation 'in factories and workshops' would not have been used. Some meaning must therefore be given to these words of limitation, and the one I have suggested is that naturally arising from the context. The use of the word 'operatives' in the title of the original act, also lends color to this construction."

The force of the opinion in this case is somewhat lessened by the fact that the decision of the Court was placed chiefly on another ground, but the Court nevertheless explicitly decided that the provisions of the stat-

ute applied only to belting, shafting and gearing *in factories and workshops*.

In *Ward v. National Lumber & Box Co.*, 54 Wash., 304, the Court said:

“The act further provides for ventilation and sanitary conditions, guarding of trap-doors and hatchways, etc.; so that it will be seen from a reading of the act that the evident intention of the legislature was to protect operatives in factories in every manner and in every particular in which they could be protected consistent with the reasonable operation of the particular factory which was engaged in business.”

In *Rabe v. Consolidated Ice Co.*, 113 Fed. 905, in speaking of the New York factory act, the Court said:

“The purpose of the statute is to throw a safeguard around the workmen employed in business establishments where machinery is in use which may endanger those who are likely to be brought into contact with it, and to whom its presence, if it is not protected, is a constant menace. So far as is consistent with the language of the statute, that purpose should be given effect.”

In the cases last cited the question now under consideration was not involved, but the language of the Courts is significant, as it shows the impression a reading of the act at once conveys, and the first impressions of a well-trained, active mind are usually correct.

Counsel for plaintiff have quoted the Act of March 14, 1911 (Laws of 1911, p. 345), defining the terms “factories,” “workshops” and “mill,” and claim that this is a legislative construction of similar words in the pre-

existing statute. The following are the definitions given:

“Factories mean *undertakings* in which the business of working at commodities is carried on with power-driven machinery, either in manufactures, repair or change, and shall include the premises, yard and plant of the concern.”

“Workshop means any plant, yard, premises, room or place wherein power-driven machinery is employed and manual labor exercised by way of trade for gain or otherwise in or incidental to the processes of making, repairing, engraving, painting or ornamenting, finishing or adapting for sale or otherwise any articles or part of articles, machine or thing, over which premises, room or place the employer of the person working therein has a right of access or control.”

“Mill means any plant, premises, room or place where machinery is used, in processes of manufacturing, changing, altering or repairing any articles or commodity for sale or otherwise, together with any yards or premises which are a part of the plant, including elevators, warehouses and bunkers.”

No doubt a legislative construction of the language of a previous act is sometimes entitled to great consideration by the courts, but it is by no means conclusive and the rule itself has no application where the earlier act is free from ambiguity. “Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be

summed up in the single observation that prior acts may be resorted to to *solve*, but not to *create*, an ambiguity."

Hamilton v. Rathbone, 175 U. S. 414, 421.

I look upon the act quoted as a legislative recognition of the self-evident fact that the language of the previous statute was not broad or comprehensive enough, and did not include all the machinery and all the appliances that should be safeguarded. Nearly every legislative act on this subject defines the terms used to describe the factories, places and machinery to which the act is intended to apply. These definitions are often purely arbitrary, and are given for the sole purpose of avoiding repetition. Thus by the Act of 1911 the legislature might well have declared that the term "factory" should include all the buildings, places and premises defined under the three terms there used.

The injury in this case occurred long prior to the passage of the Act of 1911, and the rights of the parties can not be affected by subsequent legislation. There is no limit to the power of the legislature in defining terms. It has declared that the male shall include the female; that the singular shall include the plural; that the word "person" shall include "corporation"; and it is entirely within its province to declare that the night shall include the day; but it would be idle to claim that such a legislative declaration would be binding upon the courts in construing a pre-existing statute. As said in *Bingham v. Winona County*, 8 Minn. 441, "the opinion of a subsequent legislature upon the meaning of a statute is entitled to no more weight than that of the same men in

a private capacity''; and this is doubly true where the previous statute is free from doubt or ambiguity.

The plaintiff candidly admits that the act does not apply to or preclude all shafting, coupling and machinery, and that certain classes of machinery fall within and others without the provisions of the statute. The line of demarkation must therefore be drawn some place, and if it is not drawn between machinery in factories, mills and workshops, as those terms have been defined by lexicographers, law-writers and courts, and machinery in other places, I confess I do not know where the border line between the two classes of machinery can be said to lie. The plant in this case does not differ from the threshing machine, the steam shovel, the wrecking car, and many other mills, machines and appliances that might be named. Indeed, it differs in degree and not in kind from the concrete mixers and asphalt mixers which we see in use every day on the streets of our cities, and it will scarcely be claimed that these are factories, mills or workshops.

In reaching this conclusion I have avoided the rule of strict construction; for while the statute is in derogation of the common law and imposes a penalty for its violation, yet, like the Hours of Service Act, the Safety Appliance Act, and other acts intended for the protection of the public, or of employees, it should receive a fair and reasonable construction for the purpose of giving full effect to the legislative intent. But no construction of the act within reason will save the rights of the plaintiff, and the motion for a judgment in favor of the

defendant, notwithstanding the verdict of the jury, must therefore be granted, and it is so ordered.

Endorsed: Opinion. Filed Nov. 20, 1911.

F. C. NASH, *Clerk.*

By E. E. WRIGHT, *Deputy.*

*In the Circuit Court of the United States for the Eastern
District of Washington, Southern Division.*

E. L. CASEY,

Plaintiff,

vs.

THE BARBER ASPHALT PAVING COMPANY,
Defendant.

No. 268.

JUDGMENT.

The above entitled cause having come on regularly for hearing on the 6th day of October, 1911, and the respective parties appearing with their attorneys, and a jury having been duly and regularly impaneled and sworn to try said case, the plaintiff adduced evidence and testimony in support of his pleadings herein, and rested, and the defendant adduced evidence and testimony in support of its case, and rested, after which the Court charged the jury on the 8th day of October, 1911; that said jury then retired to consider of its verdict, and on said day returned a verdict herein against the defendant, and in favor of the plaintiff in the sum of seventy-five hundred dollars (\$7500).

That thereupon the defendant, in open court, moved the Court for a judgment for the defendant notwithstanding the verdict, the hearing on which was con-

tinued to a later date, and judgment was entered in accordance with said verdict, subject, however, to the defendant's said motion.

That pursuant to the stipulation of the parties, the argument on said motion was to be presented by written briefs, which briefs were thereafter duly presented to and considered by the Court, and after said consideration, and being fully advised in the premises, said motion is hereby granted; and

It is ORDERED and ADJUDGED that the verdict and the judgment heretofore entered herein thereon, and subject to said motion, be and the same are hereby vacated, set aside and held for naught; and,

It is further ORDERED and ADJUDGED that the plaintiff take nothing herein, that said action be dismissed, and that the defendant do have and recover of and from the plaintiff its costs and disbursements herein to be taxed.

It is further ORDERED that plaintiff have until the 22d day of January, 1912, in which to serve and file a bill of exceptions in the above entitled cause.

The plaintiff excepts and said exception is allowed.

Done this 29th day of December, 1911.

(Signed) FRANK H. RUDKIN,

Judge.

O. K. as to form.

Attorneys for Plaintiff.

Endorsements: Judgment Notwithstanding the Verdict. Filed December 29, 1911.

FRANK C. NASH, *Clerk.*

In the United States District Court for the Eastern District of Washington, Southern Division.

E. L. CASEY,

Plaintiff,

vs.

THE BARBER ASPHALT COMPANY,
a Corporation,

Defendant.

BILL OF EXCEPTION.

BE IT REMEMBERED, That this cause came on for trial in the above-entitled court on the 6th day of October, 1911, the plaintiff appearing by Messrs. Thomas & Toner and A. S. Bennett, his attorneys, and the defendant appearing by A. G. Avery and C. C. Goss, its attorneys, and thereupon at said trial the plaintiff introduced testimony in support of the allegations of his complaint that he was injured in a plant being operated by the defendant at Walla Walla, Washington, at the date and place alleged in the complaint, and that said evidence, in the opinion of the Court, was sufficient to warrant the Court in submitting the case to the jury only if the plant above referred to and on which the plaintiff was injured came within the provisions of the Factory Act of the State of Washington, to-wit, Chapter 5 of Title L of Remington & Ballinger's Annotated Codes of Washington, and was a "factory, mill or workshop" within the meaning of said act. The Court was further of the opinion that unless said plant above referred to was a "factory, mill or workshop" within the meaning of said act, that there was not sufficient evidence to sustain a recovery under the provisions of said Factory Act if the plant

in question was a factory, mill or workshop within the meaning of said act. There was not sufficient evidence to support a recovery except under said act. The use of the word "plant" herein is simply for identification of the apparatus in connection with which plaintiff was injured and not as a finding or conclusion as to its character.

AND BE IT FURTHER REMEMBERED, That during the trial of said cause the following testimony was introduced in said cause bearing upon the character of such plant:

E. L. CASEY, having been called as a witness on behalf of plaintiff, and having been first duly sworn, testified as follows:

Question: You are the plaintiff in this case?

Answer: Yes, sir.

Q. Where do you live?

A. At 554 Pleasant Street.

Q. How long have you resided in this city and county?

A. I have resided in this state for practically twenty-two years, and have resided in the City of Walla Walla for six years last past, continuously.

Q. Were you in the employ of the Barber Asphalt Company on the 6th day of August, 1909?

A. I was.

Q. How long had you been in their employ?

A. About six days, six or seven days. I believe we worked one Sunday.

Q. Now, I will show you Plaintiff's Exhibit 1, and will ask you to state what that is.

It represents the plant, the central part of the plant, and the location in which I was injured.

Q. Who drew that?

A. That was drawn by Mr. Ray B. Cox, and I assisted in taking the measurements, and in printing the blue print.

Q. Where is Mr. Cox now?

A. In Boise, Idaho.

Q. You may state whether or not this is a correct drawing of the part of the plant it represents.

A. It represents, I believe, as nearly a correct drawing as a person could make by making measurements and drawing it.

Q. What was that plant or mill used for?

A. It was used for mixing asphalt, sand and crushed rock, as the case might be. If they wanted to mix material for the bottom they would mix asphalt and crushed rock, and if they wanted to mix for the top they would mix asphalt and sand, and possibly some cement, I believe.

Q. How was the material for this mixture brought there?

A. The sand and asphalt?

Q. Yes.

A. It was brought there in wagons. The railroad track was close and they brought it there in cars.

Q. How was it taken away?

A. It was hauled away in wagons, dump wagons, wagons that the bottom would fall out and let the material drop to the street.

Q. How extensive was the collection of machinery there

Mr. AVERY: I object to that. I do not object to his describing it.

The COURT: I suppose that is substantially what the question calls for.

A. It was quite an extensive piece of machinery.

Mr. AVERY: I object to that; that is not describing it.

Q. State as near as you can how big it was?

A. I should judge it would weigh one hundred and eighty tons, or something like that; maybe not so much.

Mr. AVERY: I do not think this witness is competent to testify to that.

The COURT: Its weight is not material, anyway; its dimensions nor its construction.

A. (Continued). I never saw it scaled. I remember hearing some of the employees talking about it, but I do not recall exactly what they said.

Mr. BENNETT: It seems to me that under one feature of this case the question of the description of the machinery there is important.

The COURT: I will concede that, but the statement that it was a very large piece of machinery does not convey anything.

Mr. AVERY: We do not object to his describing it.

Mr. BENNETT: That was really what I wanted.

The COURT: He may describe it.

Q. Give how big the machine was there on the ground, its dimensions and the whole thing.

A. That car was about sixty feet long and it is the ordinary width of the ordinary flat car, or some little

wider. I should judge it was something like sixteen feet wide but I cannot judge exactly.

Q. Would that be your best judgment?

A. Yes, sir.

Q. What was there belonging to the car or plant, if anything, besides what was on the car?

A. There were tool sheds built there.

Q. Where?

A. Within eighty feet of the machine, for the use of storing tools and oil.

Mr. AVERY: We move to strike that out as incompetent, irrelevant and immaterial.

Motion overruled.

Exception taken.

A. There was also a sort of a building there for the collection of dust and siftings from the material used.

Mr. AVERY: Where?

A. At the rear of the plant. It was connected with the plant by a large galvanized pipe, possibly it was twenty or thirty inches in diameter.

Q. Now go ahead.

A. Where the material was conveyed to the machine it was conveyed by an elevator with buckets on.

Q. I will ask you about this photograph; state whether or not this photograph, Defendant's Exhibit 4, shows the machine as it stood there at that time?

A. Partly, but it does not show this pit. I have a photograph taken three or four days after the accident that shows that better and plainer.

Q. Does it show the hopper where the material was put?

A. It does not.

Q. Now, how much of the car you spoke of was taken up or covered by the machinery?

A. All of the car was covered with machinery, including, of course, the vats for heating the tar and the rolls for the hot material.

Q. Now, was there any roof over any part of this machinery?

A. There was a driveway where the wagons drove up to be loaded. There was a roof where the wagons could drive under to load. There was also a platform on each side projecting out.

A. The platform where the wagons were loaded was an iron platform on either side. There was a platform on either side, and the side facing Main Street was for employees walking along there in order to work with the machine, to fire the furnaces and to get to the machine from this platform.

Q. Now, watch the questions closely and just answer as we go along and we will get at it more orderly. The question was what part of this plant was covered with a roof, including the car and the machinery on the car?

A. The vats and rolls were covered with a tin roof. The machinery in the center of the car was not covered.

Q. Now, these platforms you spoke about, the ones where the wagons loaded, and the one where the men walked, was that on the car?

A. No, sir; they were not.

Q. Where were they in relation to the car

A. They were fastened on one side to about a level with the car, projecting out possibly a distance of four

feet, and then stakes were put into the ground and boards were laid on top.

Q. How was that with the other one where the wagons loaded?

A. It was higher. It was built just the same, and projected out probably ten or twelve feet, with space enough to let a wagon drive under and load.

Q. What was that platform used for, how was it used in loading?

A. It was in the central part of the plant. I suppose this was used to protect the teams. The asphalt was hot—

Q. How was the platform used in loading the material?

A. A man would stand on the platform and operate the mixing vat and the dump to fill the wagons.

Q. How many men were working about that plant at the time you were there?

A. I do not recall the exact number. I would judge there were between six and eight employees working there at that time.

Q. Was there more than one hopper there into which material was put to be carried up into the machine?

A. No, sir.

Q. Was the crushed rock and the asphalt and the sand all put into the same hopper?

A. No, sir.

Q. Now, can you explain to the jury the operation as briefly and carefully as you can, the operation of the machine, how it operated, how the material was put in

there, how it was carried together, how it was mixed, and the whole operation?

A. Can I use something to demonstrate?

Q. If there are any of these pictures that you can use, use them. I will ask you if this photograph that you have in your hand, if those photographs you have in your hand are photographs of the plant?

A. Yes, sir.

Q. Were you there when they were taken?

A. No, sir, I was not. I was in the hospital. They were taken immediately after my injury.

Q. What do you say as to whether they are correct representations of the plant as it was when you were hurt?

A. They are correct representations of the plant as it was when I was hurt.

Mr. BENETT: Now, we will offer these in evidence.

Mr. AVERY: You say the machine was run at the time these pictures were taken the same as at the time you were hurt?

A. They were taken possibly three days after I was hurt.

Mr. AVERY: When you were hurt were they running this with a belt?

A. No, sir.

Mr. AVERY: If there is a belt shows here they do not show the conditions at the time you were hurt?

A. No, sir, that is true. It was being run with a gasoline engine when I was hurt.

Q. This was probably taken some time afterwards?

A. Yes, sir, probably it was. I had several photographs taken.

Received in evidence and marked Plaintiff's Exhibit 4 and Plaintiff's Exhibit 5.

Mr. AVERY: We consent only to the picture of the machine itself and its immediate attachments. I do not know anything about the surroundings.

Q. You may use there either of those pictures, Exhibits 4 and 5, and when you refer to one of them refer to it by number, and explain to the jury just how it was operated.

A. I now have in my hand Plaintiff's Exhibit 4. The crushed rock and sand was taken in at this end, from the left end of the machine as shown by the picture.

Q. How was it taken in?

A. It was taken in by this chain of buckets or cups and was carried up into the rolls, the two large rolls on the left end of the machine, and there heated.

Q. Where was it taken from?

A. From the ground.

Q. Was there a hopper there?

A. Yes, there was a hopper there to place the material so the chain of buckets would catch it and carry it into the machine.

Q. Go ahead.

A. It was taken into the rolls and heated and about the center of the machine it was carried into the elevator there that you see near the smokestack, then the asphalt was brought to the right side of this picture looking at it this way and was put into a large vat there. This little derrick between here and the smokestack was to

pull up the asphalt from the ground in barrels and put it in the vat. When in the vat they were heated and transmitted to the center of the plant in the vicinity of this elevator, where the mixer or grinder was, where the asphalt and sand or the asphalt and crushed rock, as the case might be, were ground and mixed together thoroughly. After that the material was transferred into the wagons to be hauled to the streets.

Q. How was it put into the wagons?

A. There was an elevator there that, when the vat was full and thoroughly mixed, the elevator would turn over and the bottom of the box would open and drop it into the wagons.

Q. Now, how much of this material would be ground through there in a day, about, approximately?

A. I do not remember the number of loads.

A. If my recollection serves me right I believe they made a wagon load of that material in seven minutes. I may be a little off one way or the other.

Q. Was it operated all day.

A. Yes, sir; it was started up and if working properly was worked all day. It was never shut down for noon, but worked on until night.

Q. Now take Plaintiff's Exhibit 1 and explain to the jury what that part marked "A" represents, in reference to what you have already said.

A. The part marked "A" represents a revolving screen inside of the sheet iron casing where the material was screened.

Q. Now, what material would be occupying that screen or drum?

A. The crushed rock, I believe, was in there.

Q. Where was the sand heated, if at all?

A. The sand was heated in the drums where the crushed rock was heated.

Q. In this same manner? In this same one?

A. No, the left of the machine looking at Plaintiff's Exhibit 4.

Q. The drums where that was heated do not show on this plan here

A. No, sir, they do not.

Q. Now, when the plant was in operation was "A" hot or cold?

A. It depends on whether they were using sand or crushed rock. If they were using crushed rock the drum would be hot and if they were using sand it would be cold—not cold, because the entire plant was warm, but not so hot as in using the crushed rock. If my memory serves me right I think the crushed rock was screened in there.

Mr. BENNETT: I will put some letter here, if you have no objection.

Mr. AVERY: We have no objection.

A. (Continued). I was not thoroughly acquainted with the manufacture of asphalt pavement.

Q. Now, tell the jury what the shaft running from X to Y on the plan represents

A. That represents the drive shaft.

Q. What machinery was driven by that shaft?

A. I would judge the rolls to the left of the plan looking at Plaintiff's Exhibit 4 and the chain of buckets that was used to transmit the material into the rolls, in

fact all of the machinery of the plant with the exception of the derrick used for elevating the asphalt into the vats. It also operated the fan that blew the dust out of the material.

Q. Now, what do these cogwheels at F represent?

A. Those cogwheels at F represent the cog gears from the gear shaft; one of them is on the shaft and the other is a counter-gear wheel to run the large cogwheels above, on the end of which were the rolls where the material was mixed.

Q. Do the large cogwheels above show here?

A. No, sir.

Q. Do they show in any of these pictures?

A. Yes, sir. Just the outlines of the large gears are shown here—this dotted line.

Q. Does the large wheel show on defendant's Exhibit 2?

A. Yes, sir, both of them show. The corner of the picture is one and the center part at the top is the other large cogwheel. They mesh into each other.

Q. Now, is the shaft appearing on this Defendant's Exhibit 2 the same as the shaft that extends from X to Y on the plan—is it part of the same shaft?

A. Yes, sir, it is the same shaft.

Q. Now, you may state what your duties were during that time.

A. Engineer and oiler.

Q. You were engineer and oiler?

A. Yes, sir.

Q. What was the source of power of that mixing mill?

A. A gasoline engine. The horse power was about fifty to sixty, I believe.

Q. What machinery did you have to oil?

A. All of the machinery on the plant, together with the engine.

Q. Now, in what manner was that mill conducted as to constant operation.

A. Unless absolutely necessary to shut down on account of a break they operated all day. They started at seven in the morning. Generally they would operate all day and would not shut down for the noon hour, and would only shut down in the evening and would begin the next morning.

Q. You would not shut down at noon?

A. No, sir.

Q. Was there any reason why the mill operated continuously?

A. Yes, sir. These large rolls located at the left of the machine, looking at Plaintiff's Exhibit 4, were hot when they were revolving, and—

Q. How hot were they?

A. They were very hot. I know there was a furnace under them and they were nearly redhot. They were so hot that if we shut down they would warp in the center.

Q. Was there anything in them that made them warp?

A. Yes, sir; the hot material.

Q. What would its condition be? Why would it warp?

A. It was heavy, the rolls being hot it would warp them if they were left standing in one position.

Q. Now, how often did you have to oil that machinery?

A. Well, about every hour. I believe it was my instructions to oil the machinery every hour, and possibly a little oftener. I used my own discretion more or less, and oiled whenever it needed it. Some parts required oiling oftener than others. For instance, the fan required more attention and watching than other parts. It ran at a high rate of speed.

Q. How was that machinery as to operating smoothly or heating?

A. It was very liable to heat when they used sand or crushed rock, either. The sand would fly and get all over the machine, and into the gasoline engine. It was a mass of sand. You could wipe off sand any place, and, of course, it would get into the boxing and make the boxing heat.

CROSS-EXAMINATION.

Q. You say this exhibit 1, this blue print, represents the correct plan of the plant, or that part which it purports to represent?

A. Yes, sir, as near as can be drawn.

Q. Did you say this car projecting above the platform, above the tracks, was sixteen feet wide, is that what you said?

A. As near as I can tell, somewhere along there.

Q. It was about the size of an ordinary flat car?

A. I judge it was a little wider.

Q. It was made for moving on the railroad tracks?

A. Yes, sir.

Q. It set on the regular tracks?

A. Yes, sir.

Q. It could be put on a train of cars and taken to some other point?

A. Yes, sir.

THE COURT: Was it ever taken from the rails?

A. They would build a side track to get it wherever they wanted it, and it would be left on the rails and left there.

Q. They would build a spur out there where they wanted it and when they got it where they wanted it they would take up the intervening track?

A. Yes, sir, that is correct.

Q. How long did you say that plant was? I think you said sixty feet?

A. About sixty feet. I am guessing at it.

Q. You said something about some sheds around there, and I did not quite understand what you meant, what sheds did you refer to?

A. One was the tool shed; it was a little building with a roof over it.

Q. Just to throw the tools in

A. Yes, and they kept the oil in there.

Q. How large was it?

A. I judge it was twelve by fourteen feet.

Q. That did not have anything to do with the plant? That had to do with the laying of the asphalt on the streets, that was where they kept the street tools?

A. No, they kept lots of the plant tools there, and all the oil.

Q. How far was it from this place?

A. Eighty or ninety feet.

Q. Is it in any of these pictures?

A. Yes, sir, it is in one, I believe.

Q. Is it in this one, Plaintiff's Exhibit 4?

A. Yes, sir, it shows just the top of one corner, and it also shows the office where the phone was. This is the tool shed here.

Q. The place I mark with an A is that the corner of the tool house you refer to?

A. Yes, sir, that represents the tool house.

Q. Now Mr. Casey you said there was a box to hold dust twenty by thirty inches?

A. I do not believe I stated that.

Q. Well twenty by thirty. I do not remember whether feet or inches.

A. I do not remember that. There was a square box—

Q. Where?

A. In the rear of the plant, close to the chain of buckets used to carry the material.

Q. I hand you Defendant's Exhibit 4, is it in that?

A. No, sir.

Q. Does it show on any of your exhibits

A. Yes, sir.

Q. Which one?

A. It shows on Plaintiff's Exhibit 4.

Q. I will put the letter B there, is that the dust box you refer to?

A. Yes, sir, that is where the screenings were thrown, in there.

Q. Did you say anything about a hopper in here?

A. Yes, sir.

Q. Is it on your exhibit 4?

A. Yes, sir, it is represented in Plaintiff's Exhibit 4.

Q. Where is it?

A. Right at the base of the chain of buckets there. There is a kind of a hole there.

Q. Is it a hole immediately above the letter C, I am making?

A. Yes, sir, right there.

Q. This is the hopper you refer to?

A. Yes, sir.

Q. This is a hole in the ground in which they dumped the stuff in and then it is dumped into the elevator to be taken up

A. Yes, sir, I judge so.

Q. Looking at Plaintiff's Exhibit 4 which way are you looking?

A. We are looking towards Ninth street. It would be northwesterly I believe.

Q. Are you sure you are not looking in a southerly direction?

A. I think it would be west, just about, if my memory serves me right.

Q. Isn't this the front of the machine?

A. It depends on what you call the front of the machine.

Q. The platform the employes walked on?

A. It shows the side of the machine facing Main Street. The employes go on both sides.

Q. This is the side you feed from, you feed the kettles from here?

A. No, not the kettles, not the asphalt kettles.

Q. I mean you feed the furnaces under the kettles?

A. It shows the side where the furnaces are located that heat the sand rolls. It shows on the opposite end the furnaces that heat the asphalt.

Q. Is the platform there that you unload from into the wagons?

A. Yes, they haul on that side on the end.

Q. We see that side of the plant do we?

A. Yes, sir, we see that side.

Q. Then I take it the compression pump is on the other side of the machine?

A. No, sir.

Q. Isn't that platform on the opposite side from the compressor and loading platform?

A. Where it is loaded, not where it is unloaded to be taken into the sand rolls.

Q. Now I want it settled, is this the side Judge Bennett inquired about?

A. The side where the wagons are loaded does not show on this picture.

Q. That is on the other side?

A. It does not show where the wagons are loaded.

Q. Is it on the opposite side?

A. Yes, it is on the opposite side as the plan is shown by this picture.

Said hearing was then adjourned until the hour of one-thirty p. m. of the same day at which time the following further proceedings were had, among others:

E. L. CASEY resumed the witness chair, and upon further cross-examination testified as follows:

Question. I will ask you if the roof you refer to was not simply the top of these drums.

A. It was the covering of the kettle on one end and the covering of the drum on the other end.

Q. That covering was necessary in order to operate the kettle on one end and the drums on the other.

A. I presume so.

Q. To maintain the heat?

A. I believe so.

Q. Now referring to these pictures (showing photos not in evidence), I will ask you to look at this picture as far as the two ends beyond the center space is concerned, and see if this is not a picture of the plant, a fair representation of the plant.

A. It represents it generally.

Q. Wherein is there any difference in the ends?

A. That is plant number 1 and the other was plant number 8.

Q. You are taking that from the picture?

A. Yes, sir.

Q. It is relatively alike isn't it?

A. Yes, relatively, but there is quite a difference between this plant and the other one.

Q. What difference is there between the two ends as distinct from the space in the center?

A. The tar kettles look nearly the same. The other end is not as high and is differently constructed.

Q. How different?

A. The air compressor is different.

Q. You have a locomotive air compressor on this plant?

A. Yes, sir.

Q. This one is not the locomotive kind?

A. Yes, sir.

Q. If there is anything different just tell the jury?

A. To look at this picture and look at the plant I was injured in you would recognize they were both paving plants.

Q. You would recognize they were both the same kind of a plant? The general characteristics are the same on the ends?

A. Practically, but there are different features.

Q. What features are different?

A. The general looks of the machinery. The engine is different, the elevator is different, and these furnaces under the rolls seem to be differently constructed.

Q. How?

A. If I am not mistaken there is more than one fire box under the others.

Q. Look at your exhibit 4 and you will see it is all dark in there and you cannot see any of the details—that is what I am trying to bring out?

A. This seems to be plain enough to discern the general lay of the plant. I can see quite a difference in them.

Q. This one in the picture I hand you that is not in evidence, you say it is not the same on this side where the kettles are?

A. They are different.

Q. Wherein are they different?

A. The roll on which I was hurt is taller and there

are several different features. I do not think that was as large as this one.

Q. Now take Defendant's Exhibit 4, which is a little lighter, this side of it, the right hand side is where the kettles are, isn't it, the right half that you see in a general way?

A. Yes, sir, the right half of the picture represents the kettles.

Q. Right at the bottom of that are three stokeholes for fire places?

A. Yes, sir.

Q. And the three things up here are smoke stacks?

A. Yes, I believe so.

Q. And to the left and nearly in the center is the elevator?

A. Yes, sir, only it was on the opposite side of the machine.

Q. It is in the back of the machine?

A. Yes, sir.

Q. You would call this side of the exhibit the front of it?

A. I always considered that the front, because it was the side on which most of my work was done.

Q. Now regarding the platforms, these platforms, did you say there were one or two?

A. Where?

Q. Back of the plant, you said there were two platforms didn't you, or one?

A. I do not know whether I said there were two or not. I said the platform on the side where the wagons were loaded was an iron platform on the opposite side.

Q. The platform on the opposite side was right at the top of the car tracks?

A. Yes, sir, nearly level with the car.

Q. Level with what you would call the bottom of the car if it had been a flat car?

A. Yes, sir.

Q. We will call that the front side.

A. Yes, sir.

Q. That is where you generally did your work, along on that platform—was it a plank platform?

A. Yes, sir, most of my work was there because the engine was there.

Q. I will now show you this exhibit 1, this platform where the little ladder runs up is the one you refer to?

A. Yes, sir. This is not quite the same, but that is the side of the machine I am referring to.

Q. The platform on the other side was simply for the purpose of dumping.

A. Yes, sir.

Q. This stuff was mixed and dumped through a hole in the platform into the wagons to receive it

A. Practically speaking, yes, sir. The platform extended along by the asphalt kettles. I believe there were some stacks to be raised and lowered there.

Q. This platform—I am looking at your exhibit 5—these platforms you refer to are left off of the picture?

A. Yes, sir.

Q. The first part of that, I take it, is the hole for the asphalt down through into the wagons under it?

A. Yes, sir.

Q. The part more to the left of that platform, as it

extended more to the left was for the purpose of raising and lowering these stacks?

A. Yes, sir.

Q. Were these stacks raised and lowered every day or for the purpose of putting it on a train of cars, or don't you know they are telescopic stacks, aren't they?

A. Yes, sir, I believe so. It depended on the condition of the fire in them as to how they used them.

Q. Now this derrick, you mentioned a derrick, take your exhibit 4, is that little triangular thing there to the right—is that the derrick?

A. The derrick I refer to is an air hoist, but when the air hoist would not work the asphalt had to be taken up there with a block and tackle. That was not a part of my work.

Q. Your work was confined to running the engine and oiling the machinery?

A. Yes, sir, keeping the machinery oiled.

Q. And running the engine?

A. Yes, sir.

Q. Now take your exhibit 6, we are looking from the front to the back, where was your engine, here to the right?

A. Yes, sir.

Q. Is it shown here?

A. No, sir, it is not shown there.

Q. It was an upright gasoline engine?

A. Yes, sir.

Q. At the left end of the middle part?

A. Nearly in the center of the car, and to the end of the asphalt kettle.

Q. As a matter of fact this machine did not do any grinding?

A. When the two kinds of material came together they were ground together and mixed.

Q. They were ground together?

A. Yes, sir.

Q. What was there to grind them?

A. There were kind of paddles. I did not operate it, but I have seen it a good many times.

Q. It did not grind them in?

A. It ground them together.

Q. Did it break up the material?

A. It might break up portions of the sand.

Q. It mixed it didn't it?

A. Yes, sir.

Q. It did not do any more than mix it

A. It ground the material together.

Q. What do you mean by "grinding it together?"

A. It mixed it and ground it.

Q. How did it grind it? Did it break up some of the particles?

A. Possibly.

Q. There weren't any teeth or anything to crush them?

A. There were kind of teeth.

Q. That crushed it?

THE COURT: I doubt whether it makes any difference whether it ground it or crushed it.

Q. Now you said some part of the machinery was hot when the sand was run through and cold when the rock was run through?

A. I am not thoroughly acquainted with the manufacture of asphalt pavement. My duties were to oil the machinery. It was my impression it was heated when the rock was run through there. I know that thing at times was hotter than at other times. I believe I said it was hot when the rock was run through and cold when the sand was run through. I do not think the sand was screened.

Q. You stated it had to run all the time and if it stopped the rock and sand or whatever was in there would have a tendency to make it warp?

A. Yes, sir.

Q. At noons and at times when the plant was not issuing its product, at those times there wasn't anything in there, it was run empty, wasn't it?

A. When they were loading the wagons the engine was running and the rolls were kept revolving. Sometimes when it was absolutely necessary to shut down the plant in the mill and shut down the engine they would they would take a crowbar and keep these rolls revolving to keep them from warping.

Q. When you went to dinner there wasn't anything in it?

A. There was a string of wagons going to the street.

Q. There were times when the wheels were going when there wasn't anything going through, wasn't that so at noon?

A. Yes, sir. In the evening when the men were sent away with their teams the plant was kept running an hour and a half or two hours in order to let those rolls cool. The fire was taken out and water thrown on it

and the engine was operated in order to let the rolls cool. I would leave my work and Mr. Ryan would close the engine down after I would leave.

Q. They were empty at that time, the rolls?

A. Yes, sir, of course, after we would quit mixing material.

Q. Now in relation to the covering on the two ends of the cars, was that high enough so you could get under it and work under it?

MR. AVERY: We object, there is no evidence that there was any roof to the car.

THE COURT: He testified there was a covering of some kind. The witness may say how high it was.

A. The covering over the kettle, the asphalt kettles was right on top of the kettles, flat across them, and the covering over the rolls where the gravel and crushed rock and sand were heated was flat on top and oval on both sides. I do not know how high above the rolls it was. The rolls were not visible.

Q. I want to know whether it was so the employes could go under that covering at the two ends.

A. No, sir, not unless they crawled under the car.

Q. Now in relation to this hole or hopper where the material was taken up, wasn't it a mere hole in the ground, or what was it?

A. It is my recollection there was a hole dug in the ground and timbers were put there to bolt castings on which a chain run to run this other chain. The casting was bolted to these large timbers, and this hopper was built upon it leaving a place for the chain to run through,

and the hopper was built up level with the ground, so the employes scooping the sand or crushed rock could scoop on a level with the ground. I suppose it was built for that purpose. That is my recollection of the way it was built.

Q. You said something in your cross examination about the office telephone, was it used in connection with the mixing mill?

A. Yes, sir, there was a telephone in there and it was the Barber Asphalt Paving Company's telephone. They used that as an office.

Q. As an office for the mill

A. Yes, sir.

Q. How far was that from the balance of the plant or machinery?

A. It stood right next to the tool shed, I judge fifty feet or somewhere along there.

Q. How large a building was it?

A. It had a gable roof, about ten by twelve, or eight by ten.

RE-CROSS EXAMINATION.

Question: Is it in any of the pictures?

Answer: Yes, sir, I believe so.

Q. Calling your attention to Plaintiff's Exhibit 4, right above this pipe and to the left of the elevator is what looks to be an awning over a window?

A. It is a sack.

Q. Is that the building you refer to

A. Yes, that is the building, I believe.

Q. I will mark X on the roof, is that the building?

A. Yes, I think that is the building.

Q. A sack was over the window?

A. I am not positive as to the sack, it looks like a sack.

Q. Now I am going to ask you if the upper left hand picture here is not substantially a representation of the cross section of the center, about the position of the air pump?

A. I would say it is a very poor representation of that machine.

Q. Wherein is it poor?

A. These things are not relatively the same size, this one and this one.

Q. You say it is not relatively the same?

A. They are not in the same proportion in the machine as this shows them.

Q. What do you say about the distance in there, assuming this marked "air pump" is the air pump?

A. I do not think there is as much space in this drawing as there is in the machine.

Q. You do not think there is as much space here as on the machine?

A. I do not think so.

Q. This phone you mentioned there in the office, that was the office where the phone was in respect to all of the work in this city wasn't it?

A. That was headquarters for the Barber Asphalt Paving Company.

BE IT REMEMBERED FURTHER that plaintiff's exhibits 1 to 9, and the defendant's exhibit 4 accompanying this bill of exceptions and certified to by this Court were duly identified as pictures and diagrams of

said plant and as tending to show its character and nature and were duly offered and were admitted in evidence and that there was no other or further testimony or evidence in said case offered upon either side showing or tending to show the character, dimensions or situation of said plant or the process carried on at the same or bearing in any way upon the question of whether or not the said cause came within the Factory Act hereinbefore alluded to except the foregoing including said exhibits.

AND BE IT FURTHER REMEMBERED that after the close of the plaintiff's case in chief and after he had rested, the defendant moved the court for a nonsuit, which motion after argument was then and there denied and an exception requested by the defendant to said order was duly allowed.

AND BE IT FURTHER REMEMBERED that after the defendant had submitted its evidence and rested and after the rebuttal, evidence of the plaintiff had been submitted and the plaintiff rested and the case was closed, the defendant challenged the sufficiency of the evidence on the whole case to warrant submitting the case to the jury, and moved the court that the case be taken from further consideration of the jury and judgment rendered in favor of the defendant on the ground that neither the evidence on the plaintiff's case in chief nor on the whole case warranted a finding of any kind against the defendant, which motion the court, then and there, overruled, and an exception allowed, stating that he would entertain a motion for a judgment notwithstanding the verdict in event a verdict was returned against the defendant.

AND BE IT FURTHER REMEMBERED, that, after the arguments in the case, it was duly submitted by the Court to the jury, which returned a verdict in favor of the plaintiff in the sum of \$7,500.00.

AND BE IT FURTHER REMEMBERED that thereupon, in open court, the defendant moved the Court for a judgment for the defendant notwithstanding the verdict, the hearing on which was continued to a later day and judgment was entered in accordance with said verdict, subject, however, to the defendant's said motion.

And be it further remembered that the Court, having listened to argument upon said motion, and taken the same under advisement, did, on the 2d day of January, 1912, set aside the judgment and verdict in said cause and in favor of the plaintiff, and entered an order adjudging that the defendant have judgment against the plaintiff notwithstanding the verdict for its costs and disbursements made and expended in said action, and that said cause be dismissed, to which order of the Court the plaintiff then and there excepted, and the exception was allowed.

And now this Bill of Exceptions having been prepared and submitted within the time heretofore fixed by the order of the Court, and having been corrected and amended by the Court until the same states the facts bearing upon the case, the same is now signed and made a part of the records of said cause this 13th day of April, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Due and legal and timely service of the foregoing proposed bill of exceptions upon me at Spokane, Washington, is hereby acknowledged.

(Signed) POST, AVERY & HIGGINS,
Attorneys for Defendant.

Bill of Exceptions.

Filed April 13, 1912.

W. H. HARE, *Clerk.*

By E. E. WRIGHT, *Deputy.*

*In the District Court (Previously Circuit Court) of the
United States for the Eastern District of Wash-
ington, Southern Division.*

T. L. CASEY,

Plaintiff,

vs.

THE BARBER ASPHALT PAVING COMPANY,
Defendant.

ASSIGNMENT OF ERRORS.

The plaintiff in the above entitled action, and plaintiff in error herein, having petitioned for an order from said Court permitting him to procure a writ of error to the Court, directed from the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment made and entered in the said cause against plaintiff, and the petitioner herein, and in favor of the defendant, The Barber Asphalt Paving Company, now makes and files with the petition the following specifications as his assignments of error herein, upon which he will rely for the reversal of said judgment upon the said writ; and says that in the record and proceedings in the above

entitled cause, upon the hearing and determination thereof in the Circuit Court of the United States for the Eastern District of Washington, there is manifest error in this, to-wit:

1. That the said Court erred in granting and allowing the defendant's motion to set aside the verdict in favor of plaintiff for seventy-five hundred dollars (\$7,500), previously entered in said cause and for a judgment in favor of defendant notwithstanding said verdict.

2. That said Court erred in ordering and adjudging that the judgment in favor of plaintiff for the said sum of \$7,500 theretofore entered in said cause be set aside and in setting aside and vacating the same.

3. That the said Court erred in ordering and adjudging that the plaintiff take nothing in said action and that the said action be dismissed.

4. That the said Court erred in ordering and adjudging that the defendant have and recover of and from the plaintiff its costs and disbursements to be taxed in said action.

5. That the said Court erred in refusing and failing to sustain the judgment and verdict in favor of plaintiff previously entered in said cause.

(Signed) BENNETT & SINNOTT,

(Signed) J. G. THOMAS and W. A. TONER,

Attorneys for Plaintiff and Plaintiff in Error.

Endorsements: Service of the within Assignment

admitted and the receipt of a true copy thereof acknowledged this 24th day of June, 1912.

(Signed) POST, AVERY & HIGGINS,
Attorneys for Defendant.

Assignment of Errors.

Filed June 24, 1912.

W. H. HARE, *Clerk.*

By F. C. NASH, *Deputy.*

*In the District Court (Previously Circuit Court) of the
United States for the Eastern District of
Washington, Southern Division.*

E. L. CASEY,

Plaintiff,

vs.

THE BARBER ASPHALT PAVING COMPANY,
a Corporation,

Defendant.

PETITION FOR WRIT OF ERROR.

*To the Honorable Judge of the Circuit Court of the
United States for the Eastern District of Wash-
ington:*

Your petitioner herein, E. L. Casey, the plaintiff in the above entitled cause, brings this, his petition for a Writ of Error, to the Circuit Court of the United States for the Eastern District of Washington, and thereupon your petitioner shows:

That on the 2d day of January, 1912, there was entered and rendered in the above entitled Court in the above entitled cause a judgment against your petitioner, and in favor of the above named defendant, The Barber

Asphalt Paving Company, wherein whereby said defendant obtained a judgment setting aside the verdict and judgment previously entered in said cause in favor of the plaintiff and vacating the same and ordering that said action be dismissed and that plaintiff take nothing therein, and that the defendant have and recover its costs and disbursements from the plaintiff; and your petitioner shows that he is advised by counsel that there was manifest error in the records and proceedings had in said cause, and in the rendition of the said judgment, to the great injury and damage of your petitioner, all of which error will be more fully made to appear by an examination of the said record, and more particularly by an examination of the bill of exceptions by your petitioner tendered and filed therein, and in the assignment of error thereon, hereinafter set out, and to the end, therefore, that the said judgment and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioner now prays that writ of error may be issued, directed therefrom to the said Circuit Court of the United States for the Eastern District of Washington, returnable according to law and the practice of the Court, and that there may be directed to be returned pursuant thereto, a true copy of the record, bill of exceptions, assignments of error and all proceedings had in said cause, that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the error, if any hath happened, may be duly corrected and full and speedy justice done your petitioner.

And your petitioner now makes the assignments of error attached hereto, upon which he will rely, and which will be made to appear by a return of the said record, in obedience to said writ.

Wherefore, your petitioner prays the issuance of a writ, as hereinbefore prayed, and prays that the assignments of error annexed hereto may be considered as his assignments of error upon the writ, and that the judgment rendered in this cause may be reversed and held for naught, and said cause be remanded for further proceedings.

(Signed) E. L. CASEY,
Plaintiff.

(Signed) BENNETT & SINNOTT,
(Signed) J. G. THOMAS and W. A. TONER,
Attorneys for Plaintiff.

Endorsements: Service of the foregoing petition admitted and receipt of a true copy acknowledged this 24th day of June, 1912.

(Signed) POST, AVERY & HIGGINS,
Attorneys for Defendant.

Petition for Writ of Error.

Filed June 24, 1912.

W. H. HARE, *Clerk.*

By F. C. NASH, *Deputy.*

*In the District Court (Previously Circuit Court) of the
United States for the Eastern District of
Washington, Southern Division.*

E. L. CASEY,

Plaintiff,

vs.

THE BARBER ASPHALT PAVING COMPANY,
a Corporation,

Defendant.

ORDER ALLOWING PETITION FOR WRIT OF
ERROR.

Now, at this time, comes the plaintiff in the above entitled cause, by J. G. Thomas and W. A. Toner, and Bennett & Sinnott, his attorneys, and presents to the Court his petition praying for the allowance of a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, and also the bond of said plaintiff for costs on such writ of error, with sureties in the sum of two hundred fifty dollars (\$250), Whereupon, it is ordered that the prayer of said petition be granted, and that the Clerk of this court be, and he is hereby, directed to issue the writ prayed for in said petition, and that said bond be, and the same is hereby approved.

Dated this 24th day of June, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Service of the foregoing order ad-

mitted and receipt of a true copy thereof acknowledged this 24th day of June, 1912, at Spokane, Washington.

(Signed) POST, AVERY & HIGGINS,
Attorneys for Defendant.

Order allowing Writ of Error.

Filed June 24, 1912.

W. H. HARE, *Clerk.*

By F. C. NASH, *Deputy.*

*In the United States Court of Appeals for the Ninth
Circuit.*

E. L. CASEY,

Plaintiff in Error.

vs.

THE BARBER ASPHALT PAVING COMPANY,
a Corporation,

Defendant in Error.

WRIT OF ERROR.

(Lodged Copy.)

THE UNITED STATES OF AMERICA—ss.

*The President of the United States of America to the
Judge of the District Court (Previously Circuit
Court) of the United States for the Eastern District
of Washington, Greeting:*

Because of the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court (previously Circuit Court) before the Honorable Frank H. Rudkin, Judge of said Court, between E. L. Casey, plaintiff in error, and The Barber Asphalt Paving Company, defendant in error, a manifest error hath happened, to the great damage of the

said plaintiff in error, as by complaint doth appear; and we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 24th day of June, 1912.

(Signed) W. H. HARE,

Clerk of the District Court of the United States for the District of Washington.

(Seal)

Endorsements: Writ of Error (Lodged Copy).

Filed June 24, 1912.

W. H. HARE, *Clerk.*

*In the District Court (Previously Circuit Court) of the
United States for the Eastern District of
Washington, Southern Division.*

E. L. CASEY,

Plaintiff,

vs.

THE BARBER ASPHALT PAVING COMPANY,
a Corporation,

Defendant.

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, That we, E. L. Casey, as Principal, and American Surety Company, of New York, as Surety, are held and firmly bound unto The Barber Asphalt Paving Company, a corporation, in the sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to The Barber Asphalt Paving Company, or its successors or assigns, to which payment well and truly to be made, we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated this 22d day of June, 1912.

WHEREAS, the above named, E. L. Casey, has applied for a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above entitled cause by the Circuit Court of the United States for the Eastern District of Washington;

NOW, THEREFORE, the condition of this obligation is such that if the above named E. L. Casey shall

prosecute said writ to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

E. L. CASEY (Seal)
AMERICAN SURETY COMPANY
OF NEW YORK.

By A. G. Baumeister, Resident Vice
President.

(Corporate Seal) Attest: EDWARD C. MILLS,
Resident Assistant Secretary.

Executed in the presence of:

JULIA RAY.

A. G. BAUMEISTER.

Approved June 24, 1912.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Service of the foregoing bond admitted and receipt of a true copy thereof acknowledged this 24th day of June, 1912.

(Signed) POST, AVERY & HIGGINS,
Attorneys for Defendant.

BOND ON WRIT OF ERROR.

Filed in the U. S. District Court for the Eastern District of Washington, June 24, 1912.

W. H. HARE, *Clerk.*

By F. C. NASH, *Deputy.*

*In the District Court (Previously Circuit Court) of the
United States for the Eastern District of
Washington, Southern Division.*

E. L. CASEY,

Plaintiff,

vs.

THE BARBER ASPHALT PAVING COMPANY,
a Corporation,

Defendant.

CITATION.

(Lodged Copy.)

UNITED STATES OF AMERICA,
Eastern District of Washington—ss.

*To The Barber Asphalt Paving Company, a Corporation,
Greeting:*

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty (30) days from the date hereto, pursuant to a Writ of Error filed in the Clerk's office of the Circuit Court of the United States (now District Court) for the Eastern District of Washington, wherein E. L. Casey is the plaintiff in error and said The Barber Asphalt Paving Company is defendant in error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Spokane, in said District,
this 24th day of June, 1912.

(Seal)

FRANK H. RUDKIN,

Judge.

Endorsements: Citation (Lodged Copy).

Filed June 24, 1912.

W. H. HARE, *Clerk.*

*In the District Court (Previously Circuit Court) of the
United States, for the Eastern District of
Washington, Southern Division.*

E. L. CASEY,

Plaintiff,

vs.

THE BARBER ASPHALT PAVING COMPANY,
a Corporation,

Defendant.

ORDER TO SEND UP ORIGINAL EXHIBITS.

Now on this day came on for hearing the above entitled matter on the motion of plaintiff to send up the original exhibits with the Bill of Exceptions on writ of error to the Circuit Court of Appeals, and the Court having considered the matter,

IT IS ORDERED BY THE COURT that the plaintiff's original exhibits numbered one to nine, inclusive, and defendant's original exhibit numbered four, be sent with the Bill of Exceptions in this case.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Order to send up Original Exhibits.

Filed June 24, 1912.

W. H. HARE, *Clerk.*

UNITED STATES OF AMERICA,
Eastern District of Washington—ss.

I hereby certify that the above and foregoing exhibits, marked Plaintiff's Exhibits 1 to 9, and Defendant's Exhibit 4, are the original exhibits introduced in evidence in said cause; that the same are now hereby certified for the purpose of making them part of the record herein, in order that the same may be reviewed and considered in the Appellate Court.

Dated this 24th day of June, 1912.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Certificate of Judge to Original Exhibits.

Filed in the U. S. District Court for the Eastern District of Washington, June 24, 1912.

W. H. HARE, *Clerk.*

*In the District Court (Previously Circuit Court) of the
United States for the Eastern District of
Washington, Southern Division.*

E. L. CASEY,

Plaintiff,

vs.

THE BARBER ASPHALT PAVING COMPANY,
a Corporation.

Defendant.

PRAECIPE.

To the Clerk of the Above Entitled Court:

Please prepare, print and transmit to the Circuit Court of Appeals for the Ninth Circuit, sitting at San Fran-

cisco, the following items of record in the above entitled cause, to-wit:

1. Plaintiff's complaint in said cause.
2. The defendant's answer therein.
3. Plaintiff's reply.
4. The bill of exceptions in this cause.
5. The verdict therein.
6. The judgment in favor of the plaintiff on the verdict in said cause.
7. The judgment and order in favor of the defendant setting aside the verdict and judgment previously entered in favor of plaintiff, and ordering and adjudging that the plaintiff take nothing and that the cause be dismissed and that the defendant have and recover from the plaintiff its costs and disbursements made and expended in said action.
8. The motion of defendant for judgment notwithstanding the verdict.
9. Plaintiff's petition for writ of error with proof of service thereon.
10. The order of the Court allowing said writ of error.
11. Bond of the plaintiff for said writ.
12. Writ of error in said cause, with proof of service thereon.
13. Citation of this cause, with the proof of service thereon.
14. The opinion of the Court on the motion to set aside the verdict in this cause.
15. Judge's certificate to exhibits.

16. Order sending up original exhibits.

17. Praecipe for transcript.

18. Assignment of Errors.

(Signed) BENNETT & SINNOTT.

(Signed) J. G. THOMAS and W. A. TONER.

Attorneys for the Plaintiff and Plaintiff in Error.

Endorsements: Praecipe for transcript of record.

Filed June 24, 1912.

W. H. HARE, *Clerk.*

No. 268.

In the District Court of the United States for the Eastern District of Washington, Southern Division.

E. L. CASEY,

Plaintiff.

vs.

THE BARBER ASPHALT PAVING COMPANY,
a Corporation,

Defendant.

CLERK'S CERTIFICATE TO TRANSCRIPT OF
RECORD.

United States of America,

Eastern District of Washington.—ss.

I, W. H. HARE, Clerk of the District Court of the United States for the Eastern District of Washington do hereby certify the foregoing printed pages, numbered from one to 73 inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings as called for by the plaintiff in error in his praecipe as the same appears on page 71 of this transcript, as the same remain of record and on file in the

office of the Clerk of said District Court, and that the same constitute the record on Writ of Error from the judgment of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and herewith transmit the original Writ of Error and the original Citation issued in this cause.

I further certify that the cost of preparing, certifying and printing the foregoing transcript is the sum of \$92.90, and that the same has been paid to me by Bennett & Sinnot and Thomas & Toner, attorneys for plaintiff and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in said District, this 6th day of July, 1912.

(Signed) W. H. HARE,

(Seal)

Clerk.

By James L. Smith, Deputy Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

E. L. CASEY,

Plaintiff in Error,

vs.

THE BARBER ASPHALT PAVING

COMPANY, a corporation,

Defendant in Error.

Upon Writ of Error to the United States Circuit Court for the
Eastern District of Washington.

Eastern Division.

BRIEF OF PLAINTIFF IN ERROR

J. G. THOMAS and
W. A. TONER

Walla Walla, Washington ;

BENNETT & SINNOTT,

The Dalles, Oregon ;

Attorneys for Plaintiff in Error.

CASEY vs. BARBER ASPHALT COMPANY

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UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

E. L. CASEY,

Plaintiff in Error,

vs.

THE BARBER ASPHALT PAVING

COMPANY, a corporation,

Defendant in Error.

Upon Writ of Error to the United States Circuit Court for the
Eastern District of Washington.

Eastern Division.

BRIEF OF PLAINTIFF IN ERROR

J. G. THOMAS and
W. A. TONER and
BENNETT & SINNOTT,
Attorneys for Plaintiff in Error.

STATEMENT OF CASE

This was an action brought by the plaintiff under the Factory Act of the State of Washington, to recover damages for an injury caused by being caught in a revolving shaft while working in the defendant's plant for the manufacture of asphalt paving, at Walla Walla, Washington.

There was a verdict and judgment for the plaintiff, and afterwards this verdict was set aside, and the Court ordered a judgment in favor of the defendant notwithstanding the verdict, on the ground that the plant in question was not a factory or mill, within the meaning of the Act.

There is only one question in the case, and that is whether or not a plant like that of the defendant was a factory or mill, within the meaning of the before mentioned factory Act.

The defendant was engaged in the manufacture and laying of asphalt pavement, and for that purpose had located one of its plants at Walla Walla.

The plant in question consisted of a large amount of heavy machinery, altogether weighing about 180 tons. The greater part of this machinery was assembled upon a large flat car, about 60 feet long, and 16 feet wide, specially constructed for the purpose. This car was so built that it could be run from place to place on the railroad track. When it was desired to locate the plant at a particular place, a side track would be built from the main track, and the car with the heavy machinery run in to the desired location. It would then be made

the center of the plant. The side track connecting with the main track would be torn up, and around the machinery on the car would be constructed such offices, tool sheds, platforms, engine houses and connecting appurtenances as would be necessary for the carrying on of the plant. In this particular instance, these appurtenances consisted of an office building, a tool shed, a hopper built of timber and lumber and set into the ground for the deposit of material to be carried up into the elevators; and platforms extending out on each side of the floor to the flat car, and supported by iron braces resting on the ground.

The business carried on was the manufacture of material for asphalt paving, on a large scale, and the machinery was in the nature of a mill for the feeding, grinding and mixing, and preparing crushed rock, sand, concrete and asphalt, in the process of manufacturing such paving.

The machinery consisted, as we have said, of a large number of heavy geared iron wheels, some of them five or six feet across, meshed into each other, connected by heavy shafting, and the gearing so combined as to move the heavy part of the machinery—the conveyors, the drums in which the material was heated, the mill in which it was mixed, etc.

A force of about six or eight men were constantly employed about the plant.

The heavy character of the mill and the extent of the machinery is partially shown by plaintiff's exhibit 9 and 5 which are reproduced on the pages following.

The large gear shown on exhibit 9 was some five or six feet in diameter, and the balance of the machinery in proportion.

The Court below held that the Factory Act applied only to *enclosed buildings*, and upon that ground granted the motion for judgment notwithstanding the verdict.

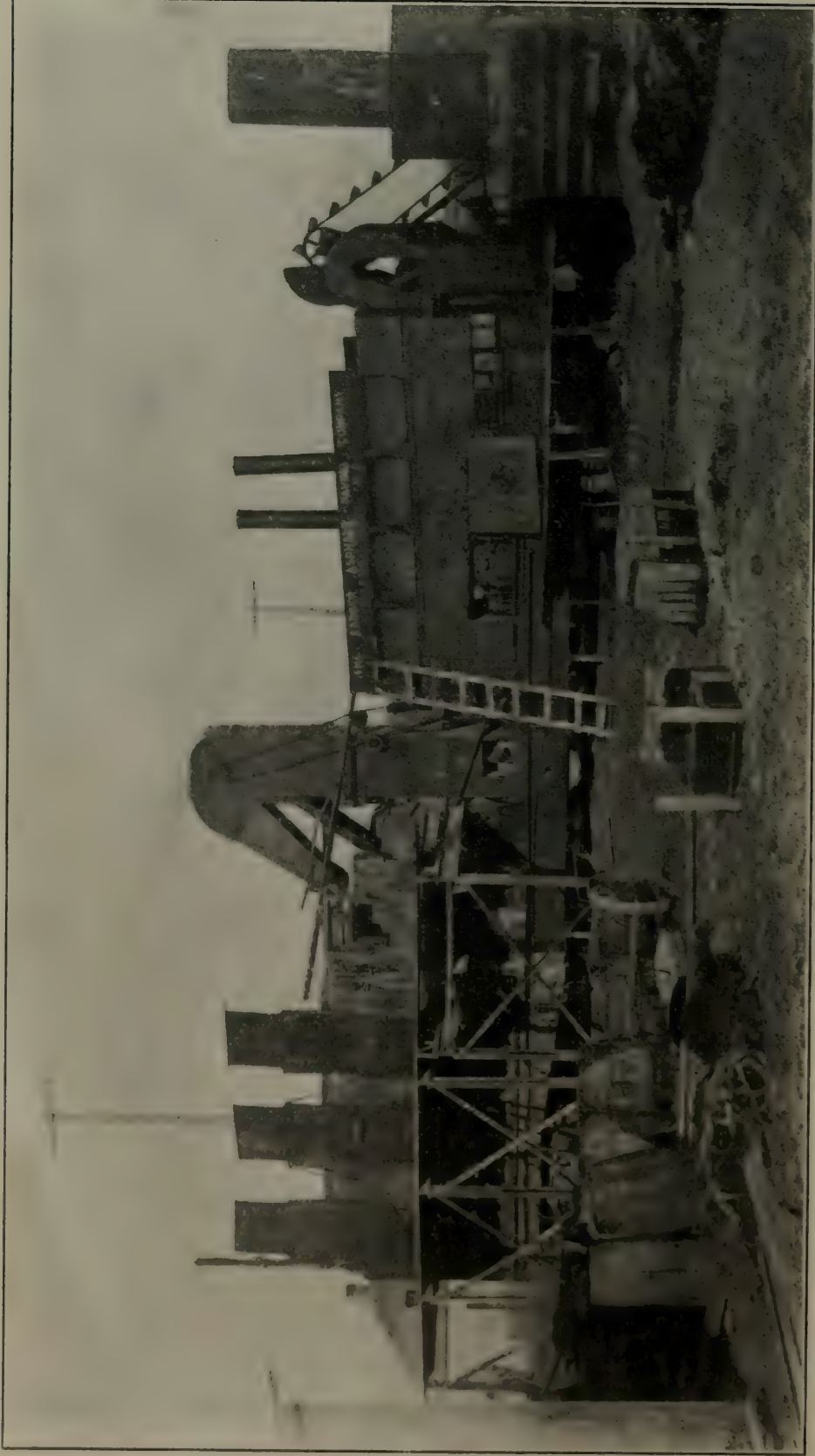
ASSIGNMENTS OF ERROR.

Assignments of error upon which plaintiff relies are as follows:

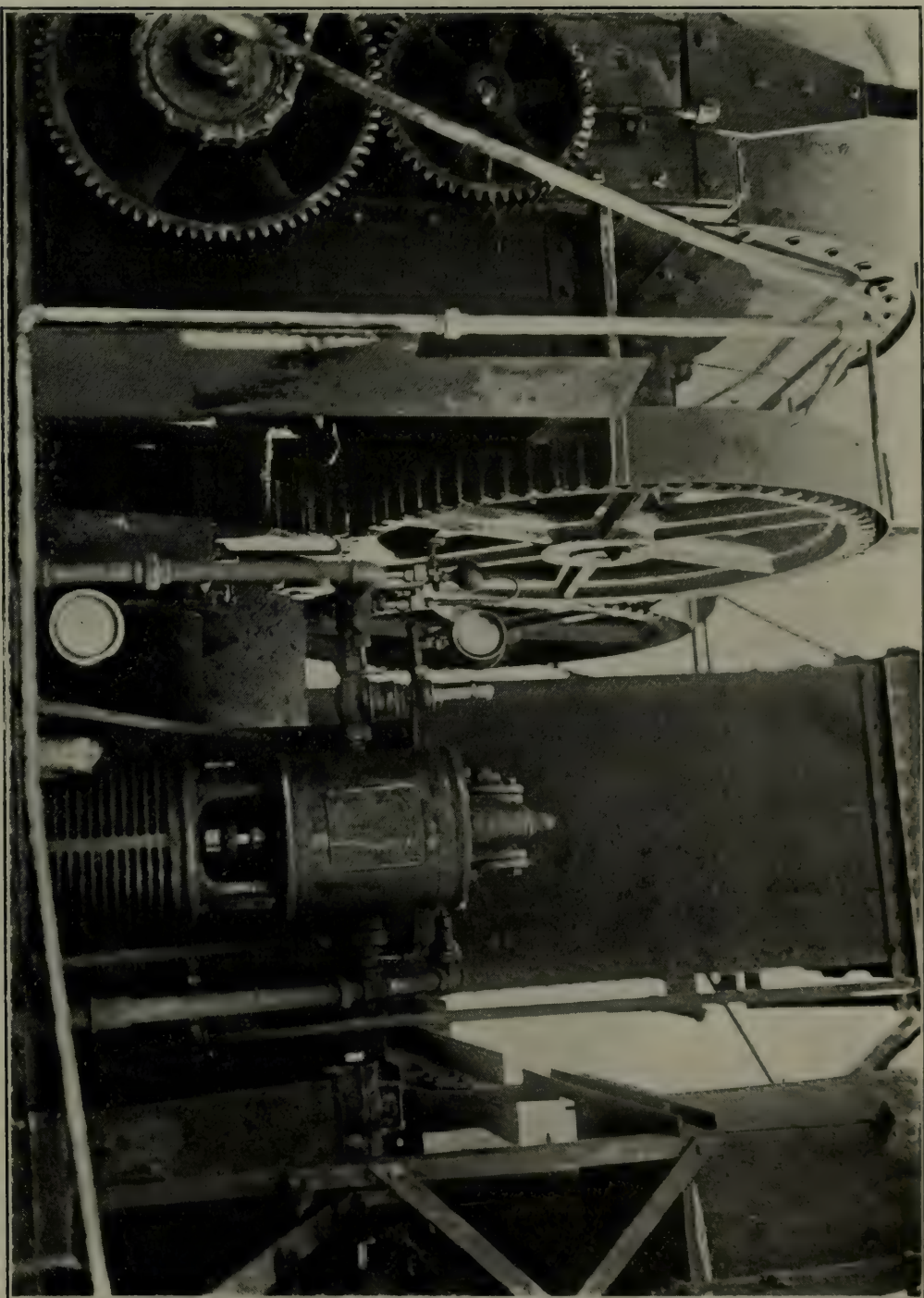
“1. That the Court erred in granting and allowing the defendant’s motion to set aside the verdict in favor of plaintiff for seventy-five hundred dollars (\$7,500), previously entered in said cause and for a judgment in favor of defendant notwithstanding said verdict.

2. That said Court erred in ordering and adjudging that the judgment in favor of plaintiff for the said sum of \$7,500 theretofore entered in said cause be set aside and in setting aside and vacating the same.

3. That the said Court erred in ordering and adjudging that the plaintiff take nothing in said action and that the said action be dismissed.



PLAINTIFF'S EXHIBIT No. 5.



PLAINTIFF'S EXHIBIT No. 9.

4. That the said Court erred in ordering and adjudging that the defendant have and recover of and from the plaintiff its costs and disbursements to be taxed in said action.

5. That the said Court erred in refusing and failing to sustain the judgment and verdict in favor of plaintiff previously entered in said cause.”

ARGUMENT

As we have already seen, the only question involved is whether or not the defendant's plant in question was a “factory” or “mill” within the meaning of Section 1 of the Act of March 6th, 1905, (as amended in 1907).

This section, in so far as it bears upon this case, is as follows:

“Section 1. That any person, firm, corporation, or association operating a *factory, mill or workshop* where machinery is used, shall provide and maintain in use * * * * reasonable safeguard for all vats, pans, trimmers, cut offs, gang edgers and other saws, planes, cogs, gearing, belting, shafts, coupling, set screws, live rollers, conveyors, mangles in laundries and machinery of other or similar description, which it is practical to guard. * * * *”

The whole case hinges upon the meaning of the words "factories," "mills" and "workshop" as used in the above section. The Court below held that this applied only to *buildings* in which manufacturing operations were carried on. The plaintiff, on the other hand, claims that this construction is too narrow and strained, and that the question of whether a given establishment is a factory or not is governed by the *character and extent of the business carried on*, rather than by the presence or absence of a building or shell.

It seems to us, and we submit to the Court, that the plant or mill in question were so clearly within the meaning of the terms "factory" and "mill" as used by the legislature, that it is hardly necessary to seek for the intent of the legislature, from the purposes or objects of the legislation, or to invoke the all pervading rule, that beneficial laws intended for the protection of human life and limb will be liberally construed.

We make no question but that the words "factory and mill" are sometimes used in as narrow a sense as claimed by the defendant herein, and refer to a building in which manufacturing or milling operations are carried on. One might say, "We will go down to the old mill, or the old factory," even when no manufacturing business was being carried on, or even when all the machinery had been taken out and we would not then be referring to the "plant" at all; but we do not believe that was the sense in which the words were used by the legislature.

The words have another, broader and more common meaning, and one far more consistent with the general purpose of this Act.

Both the words “factory” and “mill” oftentimes, though not always, cover the same establishment. We claim that this is one of those cases, and that the plant or establishment in question was both a factory and a mill, within the meaning of the law.

We claim that “factory” as used by the legislature referred to the *plant or premises* wherein manufacturing business is carried on by machinery, without regard to whether it was enclosed by walls or not, and that the word “mill” has the same signification with regard to any kind of milling business.

Many kinds of mills are commonly operated in the open. This is especially true of the so-called portable saw mills, and it is also true of many factories.

So far as the evils to which this section of the law is addressed, the danger to the employe is not affected in the slightest degree by the consideration of whether or not the plant is in a building, or surrounded by walls. The danger of the employe being caught by uncovered gearing, or shafting, or set screws, is just the same, whether the plant is, or is not enclosed by walls, and the character of the business is just the same.

It seems to us absurd to suppose that the legislature intended to create limitation to the benefits of this Act, where there was *absolutely no distinction in the character of the business or the danger involved*, and no reasonable ground for the limitation, whatever, and to say that a man who carried on a manufacturing or milling business should be liable for unguarded shafts, gearing, and set screws

if he built a wall around his plant, and that he should not be liable if he tore away the wall, or never built it at all—that the legislature intended to say that the owner of a plant like this in question should be liable if he operated in a building, but that he could escape all liability by placing the same, massive, complicated machinery on a flat car, in the midst of the offices, buildings, and appurtenances necessary to his plant, but without putting a frame foundation under it, or a wall around it.

So far as we can find, the very question here has never been presented to any Court, but the construction of other similar acts, in relation to other similar cases, and the construction of this act in relation to other questions has never been so narrow or strained.

In the Kans. case of *Fisher vs. Company*, 100 Pac., 508, the Factory Act only protected an employe while he was “engaged” in his work. The plaintiff was injured while taking his turn at *rest*. It was contended that he was not within the exact terms of the law, but the Court refused to adopt the narrow construction, and held the Company liable.

In *Matthews vs. Company (Ind.)* 92 Northeastern 199, the Act provided for the protection of “shafts” and “shaftings,” but said nothing about “pulleys.” The plaintiff was injured by a pully revolving on a shaft. The Court adopted a liberal construction, and held that pulleys were included within the spirit of the law.

In *Johnson vs. Southern Pacific*, 196 United States, 1, the statute under consideration was that generally known as the “Coupling Act,” and provided in effect that

couplers should be provided for all "cars." The injury in question was caused by the lack of a proper coupler upon a "locomotive."

There, as here, the word "car" had two meanings; one of which was broad enough to include "locomotive," and the other was not. There, as here, it was contended that the narrow and restricted meaning should be applied, but the Court refused so to do, saying:

"But where the words are general, and include various classes or persons, I know of no authority which would justify the Court in restricting them to one class, *or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them.* And where a word is used in a statute which has various known significations, I know of no rule that requires the Court to adopt one in preference to another, simply because it is more strained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, *and promotes in the fullest manner the apparent policy and objects of the legislature.*"

In *Ward vs. National Lumber Company*, 54 Wash., 304, this very Act was under construction. The plaintiff was injured there by an unguarded friction wheel, which was not named in the statute, and was not even similar to any other part of the machinery which was named. The Court refused to adopt the narrow construction, and held the company liable.

We cite these cases simply to show that in interpreting legislation for the protection of human life and limb, the Courts have uniformly refused to take a narrow or restricted view, or to adopt a narrower meaning, where a word used has two meanings, for the purpose of eliminating liability where the conditions so far as the character of the business and the danger to the employe were the same.

There can be no question, and we think there will be no contention but what the words "factory" and "mill" each have a meaning and definition recognized by the lexicographers, and by the Courts amply broad enough to include the plant in question.

One of the definitions of "factory" given by Webster is, "The *place* where workmen are employed in fabricating goods, wares, or utensils; "a manufactory," and "manufactory" is defined by the same author as—"A building or *place* where anything is manufactured."

In *Hernischel vs. Texas Drug Company*, Tex. 61, Southwestern 420, it is said :

"In the English law the term 'factory' includes all buildings or *premises* wherein or within the close or curtilage of which steam, water, or any mechanical power is used to move or work any machinery employed in preparing, manufacturing, or finishing, cotton, wool, hair, silk,

hemp or tow. Later this definition was extended to other manufacturing places. *The American legal definition of the word is practically the same.*"

The meaning with which a word has been used by legislative bodies is often referred to by lexicographers as helping to establish its meaning, the same as the use of words by writers and authors is recognized as of more or less authority.

We can think of no better way of ascertaining what a legislative body meant by the use of a particular word, than by finding out in what sense other legislative bodies had generally used the same word previous to the action of the legislature in question.

The word "factory" had been used and defined prior to 1905 and 1907 by many different legislative bodies, both in England and in the United States.

In England as we have already seen, the statute defined it as "all buildings *or premises* wherein" etc.

The legislature of Massachusetts in 1902 (Revised Laws of Massachusetts 1902, page 916, Chapter 106, Sec. 8) defines factory as "*any premises* where steam, water, or other mechanical power is used in the aid of any manufacturing process there carried on."

The same definition is contained in the General Statutes of Kansas, 1901, Section 6650, and in the Revised Statutes of Missouri, 1809, Section 10104.

In 1894 the General Statutes of Minnesota, Section 2264, defined "factory" or "mill" as "*Any premises* where steam, water, or other mechanical power is used in the aid of any manufacture." All these provisions were in use and effect long prior to the adoption of the Factory Act in the State of Washington and all of them make the definition refer to place rather than building.

We think then, and submit to the Court, that it is only fair to assume that the legislature used the word "factory" in this broader sense in which it had at that time been so frequently used by other legislative bodies, Courts and lexicographers, and that it was used to describe the place, premises or establishment; the undertaking where any kind of manufacturing was carried on.

We submit, further, that the Act itself, as well as subsequent legislation of the same state upon the same subject shows that this boarder meaning, and not the narrow meaning contended for by the defendant was the one with which the word was used. The second Section of this Act, which is Section 6588 of the Code, deals with a different condition than the preceding section. That is, with conditions which could only occur within doors, viz.: bad ventilation, and therefore the legislature very properly saw fit to limit it to factories, mills and workshops "within an enclosed room." This limitation would have been entirely unnecessary if "all" factories, mills or workshops must necessarily be in enclosed rooms.

And we submit to the Court that it is very plain that where the legislature limits the operation of the Statute to buildings, or closed rooms in the matter of ventilation, but leaves it unlimited as to the protection of gears, and machinery, that it intended one provision to apply only inside of buildings, and the other to all factories and mills whether operated in an enclosure or not.

Again, the construction of this Act, and the definition of the word for which we contend, is further supported by subsequent legislative construction. In 1911, the legislature of the state of Washington passed the Act of March 14th, Session Laws of 1911, page 345. This Act was in *pari materia* with the Act in question, and the second section uses almost the same words as are used in the Act in question, viz.: "Factories, mills and workshops where machinery is used," and section 3 of the Act defines such words as follows:

"Factories mean *undertakings* in which the business of working at commodities is carried on with power-driven machinery, either in manufactures, repair or change, and shall include the premises, yard and plant of the concern.

Workshop means any plant, yard, premises, room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise in or incidental to the process of making, altering, repairing, printing or ornamenting, finishing or adapting for sale or otherwise any articles or part of article, machine or thing, over which premises, room or place the employer of the person working therein has the right of access or control.

Mill means any plant, premises, room or place where machinery is used, any process of machinery, changing, altering or repairing any article or ocmmodity for sale or otherwise, together with the yards and premises which are a part of the plant, including elevators, warehouses and bunkers."

We do not concede that even outside of this interpretation, there would be any doubt but what the construction we have submitted to the Court of this Section, is a correct one; but if there is doubt, then this subsequent use of exactly the same words on the same general subject by the legislature of the same state is entitled to great weight as tending to show the probable sense in which the words were used in the prior enactment.

Coutant vs. The People, 11 Wendel, 512.

Amer. & Eng. Encyclopedia of Law, Second Edition, volume 26, page 624, note C.

Alexander vs. The Mayor, 5 Cranch, 2.

3 Cooperative Law, page 21.

In the last case before the Supreme Court of the United States, the Court was construing an Act of the state of Virginia of the year 1779, and there was another Act of the Virginia legislature of 1796 (17 years later), which was offered as assisting in the construction of the first Act.

Chief Justice Marshall in delivering the opinion says:

“Without deciding this questions as depending merely on the original law, it is to be observed that acts in *pari materia* are to be construed together as forming one act. If in a subsequent clause of the same act provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law.”

The learned judge in the Court below disposes of this legislative construction by assuming that the definition in the Act of 1911 was purely arbitrary, and without any regard to the previous meaning of the word. It seems to us, however, that there is little reason for this assumption, and that it should not be lightly presumed, that the legislature was indulging in a philological exercise of this kind, or abitrarily attempting to change the ordinary meaning of words. It should be presumed, on the contrary, we submit, that the definition given not only in this Act, but in the legislation of other states and countries already alluded to, was intended to be “declaratory” of the true meaning of these words as understood by the legislature, and that the legislature took pains to fix the definition (not to change the meaning) in order to prevent unnecessary litigation, and remove all doubt as to the true construction of the words.

Such declaratory definitions both of words and of

legal rights is very common in all the Codes, and where it is susceptible of that construction, is generally construed as declaratory rather than otherwise.

In the Kansas case of *Caspar vs. Lewin*, 109 Pac. 659, Sec. 7 of the Kans. Act in question had defined the term "manufacturing establishment," and the Court said:

"The only purpose of incorporating Sec. 7 in the Act was to preclude a roving request for the meaning of words. The section was designated to make the meaning of the term 'manufacturing establishment' as it had been used in the previous sections, so clear that there could be no misunderstanding of just what establishments were included. In an effort to be explicit, the draftsmen violated the law of logic, which forbids a definition to contain the word 'define' and was guilty of the ancient fallacy (*circulus in definendo*) whereby the definition ends where it started."

The definition of other terms in the Washington Act, such as "mines" and "quarry," seems to bear out this construction.

We contend that both of these words, ("factory" and "mill") as used in the Act of 1907 would very clearly include an undertaking, or establishment like the one in question without regard to these legislative constructions, but they help to clinch the proposition that the words were never used in the narrow meaning which the defendant attempts to give them.

It will be seen that the meaning given to the word “factory” in the Act of 1911, is practically the same meaning in which the word had been universally defined prior to 1905 and 1907 by other legislative bodies in England and in the United States.

So the word “mill” used in the Factory Act is clearly broad enough to include the plant in question. One of the definitions given by Webster’s Unabridged Edition, 1908, is:

“A common name for various machines which produce a manufactured product, or change the form of raw material by continuous repetition of some action, as a saw mill, or stamp mill.”

In Rapalje and Lawrence’s Law Dictionary, “mill” is defined as follows:

First—“*A machine for grinding, sawing, manufacturing, etc.*” Also, “a building containing such machinery.”

The same definition exactly is given in Black’s Law Dictionary. See also *Rose vs. Insurance Company*, 36 Northwestern, 596.

State vs. Livermore, 44 New Hampshire, 386, and
20 Amer. & Eng. Encyc. of Law, page 674.

It seems very clear to us that this was the meaning in which the words were used by the legislature, and included the *undertaking, establishment or premises* where any kind of milling business is carried on.

This definition was rejected by the Court below because the word "mill" was used by the legislature in connection with the words "shop" and "factory," and attempting to apply the maxim *Noscitur a sociis*, the Court held that because (as assumed) the words "factory and workshop" referred to building, the word "mill" must also be limited to milling operations carried on *in a building*.

It seems to us that this reasoning and application is not natural, but exceedingly strained and labored.

In the first place, as we have already seen, a “factory” is *not* necessarily a building, nor in a building, but refers to a *place*, or *undertaking* where manufacturing business is carried on without regard to whether or not it is surrounded by walls; see definitions of “factory” above.

And in the second place, it is obvious, it seems to us, that these words were not associated by the legislature as a limitation upon each other, but on the contrary each one was added to the other for the purpose of bringing in *new and different* conditions which might not otherwise have been included, and with the obvious purpose of covering manufacturing machinery under *all* conditions, where the machinery was aggregated together for manufacturing or milling processes and operated by mechanical power in such a way as to make the protection of human life and limb necessary.

A similar process of reasoning to that contended for by the defendant here applied in a slightly different way

was rejected by the Supreme Court of Washington in Ward vs. National Lumber Company, 54 Wash., 304.

It was urged at the trial, and will probably be urged again here that because some of the succeeding sections of this Act provide for some conditions which can only exist in buildings, that therefore the law only protects factories, mills and machinery, *when situated in buildings*, but we submit to the Court that this is an unnatural and unreasonable construction.

Many evils and dangers were being provided against in the law. Some of these could exist only in buildings. Some others could exist only in buildings having more than one floor; still others, only in buildings having well holes and stairways; still others only in buildings having elevators. It would be just as wise, and just as reasonable to say that because elevators were alluded to in one section of the Act, that therefore the law was only intended to apply to buildings having elevators, or that because another provision provided for the protection of stairways, that therefore the law only intended to cover factories having stairways; or ~~to cover factories having stairways; or~~ because another

provision could only apply to buildings having a floor or more than one floor that therefore a factory that had no floor, or only one floor would not be within the protection of the law, as it is to contend that because some of the provisions of these sections could only apply in buildings, that therefore the other provisions of the law which were in terms broad enough to cover machinery without regard to the building, should be given the unnatural, and reasonless limitation which would exclude such machinery though equally a manufacturing and milling concern, and equally as dangerous, simply because it was not in a building.

The law was evidently intended to cover and protect specific dangers in manufacturing and milling undertakings, wherever they might exist. If the plant had vats, the vats were protected. If it had hoists or elevators, they were protected. If it had more than one floor, the stairway, and elevators were protected. If the factory was an enclosed building, ventilation was protected. And if the factory operated machinery, the machinery was protected, without any distinction so far as the statute is concerned (and as far as reason and the danger were concerned) as to whether it was in a "building," or simply in a "place."

Much was said at the trial, and will probably be said again, of the use of the word "in" in the title of the

Act, and it was contended that the use of this word implies a building or enclosure, but we submit that this contention is utterly without merit. The word "in" is not equivalent to the word "enclosed", the use of the word is very broad. Webster defines it as "Situation or place with respect to surrounding, environment, encompassment, etc." "It is used with verbs signifying being, resting, or moving within limits or within circumstances or conditions of any kind conceived, or as limiting, confining, or investing, either wholly or in part."

We use it quite as often with reference to arbitrary and indefinite limitations as we do with reference to fixed and physical boundaries.

It is just as proper to say "in a place" as it is to say "in a building."

The word may quite as well be applied in this case to the place or premises where an undertaking is being carried on, as to a building or definite enclosure.

The use of the word has no significance in its bearing upon this case, and involves no limitations whatever in the construction of the provisions of the Act.

It is obvious that the word "factory" comes from the verb "manufacture," and Webster defines manufacture as follows: "To work, as raw or partly raw material, into suitable forms for use."

In the Kansas case of *Caspar vs. Lewin*, 109 Pac., 657, the law provided for safeguards in a "manufacturing" plant. The plaintiff was injured in a machine for breaking, or cutting up scrap iron.

The statute defined "manufacturing establishment" as "a place wherein natural products or other articles or materials of any kind in a raw, unfinished, or incomplete state or condition, are converted into a new or improved, or different form." (It will be noticed that this is almost the definition of Webster).

The Court quotes this definition and then says:

"Although somewhat elaborate in phraseology, in essence and substance, this is the universally inclusive definition of a 'manufactory' which is found in the dictionaries, encyclopedias, and works on economics."

In *Robins vs. Paulson*, 30 Wash., 462, the question was, whether the cutter of logs was a manufacturer within the lien law of the state of Washington. Dunbar Judge, delivering the opinion of the Court said, "Actual sawing of the timber is no more a part of manufacturing the same, than the cutting and preparing of such timber for the saw. In one case, the manufactured product of the laborer would be a log. In the other, the manufactured product would be the lumber." We therefore, hold that in this case, respondent was entitled to his lien on the lumber."

In *Ray vs. Consolidated Ice Company*, 113 Federal, 907, before the Circuit Court of Appeals of the Second Circuit, the question was "whether a commercial ice house extensively equipped with machinery, was a 'factory' within the meaning of the Statute of New York. While

the question here was not directly before the Court, yet the language of the opinion is very pertinent.

The purpose of the Statute is to throw a safeguard around the workmen employed in *business establishments*, where machinery is in use which may injure those who are likely to be brought into contact with it, and to whom its presence, if it is not protected, is a constant menace. *So far as is consistent with the language of the Statute, that purpose should be given effect.*

In *Kidd vs. Pearson*, 128 U. S. 1, Co-op. Edition 346, it is said "manufacture is a transforming, or fashioning of raw material into a changed form for use."

In *Schifer vs. Wood*, 21 Federal Cases, 737, it was said, " 'Manufacture' is sufficiently broad enough to include the manufacture of bone dust, and bone black, produced by exposing the bone to the action of fire, or by grinding the pieces of bone."

In *Murphy vs. Anson*, 96 U. S. 131, it was said, "Where the manipulation of fluids, and the materials blending with each other form a union, it is as much a 'manufacture' as where the materials are mechanically joined together."

In *Tidewater Oil Co. vs. U. S.*, 171, U. S. 210, it is said, "The steel spring of a watch is made ultimately from iron ore, by a large number of processes or transformations, each successive step of which is a distinct process of manufacture."

In *Horowitz vs. Widener* (N. J.) 31 Atlantic, 773, it is said, "Manufacture is simply and no more than this 'to make up by hand or by machinery, any raw material into a form fit for use.' "

In *People vs. Morgan*, 70 N. Y. Supp., 516, it was held "That a corporation maintaining a plant and appliances for heating and grinding of asphalt composition, was a 'manufacturing corporation.' "

In *Lambert vs. Bell* 18 Colo., 346, 36 Pac., 989, the Constitution of Colorado authorized the taking of private property by eminent domain for manufacturing purposes, and for milling. The question was whether an electric light plant was a milling or manufacturing plant. The Court held that it was. That is was a process of manufacture, and both a mill, and manufacturing plant. The same holding was made by the Supreme Court of New Jersey in *Bates vs. Trenton*, 58 Atl. 936-7.

We cite these cases to show that the processes carried on by the defendant were clearly manufacturing and milling processes, and that therefore, the *place* where they were carried on was a "manufactory" or "factory" within the meaning of the law, and the aggregation of machinery used for the purpose of such manufacture, was a mill.

In order that this question may be clearly presented to the Court, we re-print here such of the evidence in relation to the style and character of the plant and machinery, and the character and quantity of the business carried on, as seems to bear directly on the question.

“Q. State as near as you can how big it was?

A. I should judge it would weigh one hundred and eighty tons, or something like that; maybe not so much.”

Printed Transcript, p. 32.

* * * * *

“Q. Give how big the machine was there on the ground, its dimensions and the whole thing.

A. That car was about sixty feet long and it is the ordinary width of the ordinary flat car, or some little wider. I should judge that it was something like sixteen feet wide but I cannot judge exactly.

Q. *What was there belonging to the car or plant, if anything, besides what was on the car?*

A. *There were tool sheds built there.*

Q. Where?

A. Within eighty feet of the machine, for the use of storing tools and oil.”

Printed Transcript, p. 32-33.

* * * * *

“A. *There was also a sort of building there for the collection of dust and siftings from the material used.*

A. At the rear of the plant. It was connected with the plant by a large galvanized pipe, possibly it was twenty or thirty inches in diameter.

Q. Now go ahead.

A. Where the material was conveyed to the machine it was conveyed by an elevator with buckets on.”

Printed Transcript, p. 33.

* * * * *

“Q. Now, how much of the car you spoke of was taken up or covered by the machinery?

A. *All of the car was covered with machinery, including, of course, the vats for heating the tar and the rolls for the hot material.*

Q. Now, was there any roof over any part of this machinery?

A. There was a driveway where the wagons drove up to be loaded. There was a roof where the wagons could drive under to load. *There was also a platform on each side projecting out.*

A. The platform where the wagons were loaded was an iron platform on either side. There was a platform on either side, and the side facing Main Street was for employes walking along there in order to work with the machine, to fire the furnaces and to get to the machine from this platform."

Printed Transcript, p. 34.

* * * * *

Q. Now, these platforms you spoke about, the ones where the wagons loaded, and the one where the men walked, was that on the car?

A. No, sir; they were not.

Q. Where were they in relation to the car?

A. They were fastened on one side to about a level with the car, projecting out possibly a distance of four feet, and then stakes were put into the ground and boards were laid on top.

Q. How was that with the other one where the wagons loaded?

A. It was higher. It was built just the same, and projected out probably ten or twelve feet, with space enough to let a wagon drive under and load.

Q. What was that platform used for, and how was it used in loading?

A. It was in the central part of the plant. I suppose this was used to protect the teams. The asphalt was hot—

Q. How was the platform used in loading the material?

A. A man would stand on the platform and operate the mixing vat and the dump to fill the wagons.

Q. How many men were working about that plant at the time you were there?

A. I do not recall the exact number. I would judge there were between six and eight employes working there at the time."

Printed Transcript, pp. 34-35.

"Q. How was it taken in?

A. It was taken in by this chain of buckets or cups and was carried up into the rolls, the two large rolls on the left end of the machine, and there heated.

Q. Where was it taken from?

A. From the ground.

Q. Was there a hopper there?

A. Yes, there was a hopper there to place the material so the chain of buckets would catch it and carry it into the machine.

Q. Go ahead.

A. It was taken into the rolls and heated and about the center of the machine it was carried into the elevator there that you see near the smokestack, then the asphalt was brought to the right side of this picture looking at it this way and was put into a large vat there. This little derrick bewteen here and the smokestack was to pull up the asphalt from the ground in barrels and put it in the vat. When in the vat they were heated and transmitted to the center of the plant in the vicinity of this elevator, where the mixer or grinder was, where the asphalt and sand or the asphalt and crushed rock, as the case might be, *were ground and mixed together thoroughly*. After that the material was transferred into the wagons to be hauled to the streets.

Q. How was it put into the wagons?

A. There was an elevator there that, when the vat was full and thoroughly mixed, the elevator would turn over and the bottom of the box would open and drop it into the wagons.

Q. Was it operated all day.

A. Yes, sir; it was started up and if working properly was worked all day. It was never shut down for noon, but worked on until night."

Printed Transcript, pp. 37-38.

* * * * *

"Q. What machinery was driven by that shaft?

A. I would judge the rolls to the left of the plan looking at Plaintiff's Exhibit 4 and the chain of buckets that was used to transmit the material into the rolls, in fact all of the machinery of the plant with the exception of the derrick used for elevating the asphalt into the vats. It also operated the fan that blew the dust out of the material.

Q. Now, what do these cogwheels at "F" represent?

A. Those cogwheels at "F" represent the cog gears from the gear shaft; one of them is on the shaft and the other is a countergear wheel to run the large cogwheels above, on the end of which were the rolls where the material was mixed.

Q. Do the large cogwheels above show here?

A. No, sir.

Q. Do they show in any of these pictures?

A. Yes, sir. Just the outlines of the large gears are shown here—this dotted line.

Q. Does the large wheel show on defendant's Exhibit 2?

A. Yes, sir, both of them show. The corner of the picture is one and the center part at the top is the other large cogwheel. They mesh into each other."

Printed Transcript, pp. 39-40.

* * * * *

"Q. Did you say this car projecting above the platform, above the tracks, was sixteen feet wide, is that what you said?

A. As near as I can tell, somewhere along there.

Q. It was about the size of an ordinary flat car?

A. I judge it was a little wider."

Printed Transcript, p. 42.

* * * * *

"THE COURT: Was it ever taken from the rails?

A. They would build a side track to get it wherever they wanted it, and it would be left on the rails and left there.

Q. They would build a spur out there where they wanted it and when they got it where they wanted it they would take up the intervening track?

A. Yes, sir, that is correct."

* * * * *

"Q. You said something about some sheds around there, and I did not quite understand what you meant, what sheds did you refer to?

A. One was the tool shed; it was a little building with a roof over it.

Q. Just to throw the tools in?

A. Yes, and they kept the oil there.

Q. How large was it?

A. I judge it was about twelve by fourteen feet.

Q. That did not have anything to do with the plant? That had to do with the laying of the asphalt on the streets, that was where they kept the street tools?

A. No, they kept lots of the plant tools there, and all the oil.

Q. How far was it from this place?

A. Eighty or ninety feet."

Printed Transcript, p. 43.

* * * * *

"Q. Now regarding the platforms, these platforms, did you say there were one or two?

A. Where?

Q. Back of the plant, you said there were two platforms didn't you, or one?

A. I do not know whether I said there were two or not. I said the platform on the side where the wagons were loaded was an iron platform on the opposite side.

Q. The platform on the opposite side was right at the top of the car tracks?

A. Yes, sir, nearly level with the car.

Q. Level with what you would call the bottom of the car if it had been a flat car?

A. Yes, sir."

Printed Transcript, pp. 49-50.

* * * * *

A. When the two kinds of material came together they were ground together and mixed.

Q. They were ground together?

A. Yes, sir.

Q. What was there to grind them?

A. There were kind of paddles. I did not operate it, but I have seen it a good many times.

Q. It did not grind them in?

A. It ground them together.

Q. Did it break up the material?

A. It might break up portions of the sand.

Q. It mixed it didn't it?

A. Yes, sir.

Q. It did not do any more than mix it?

A. It ground the material together.

Q. What do you mean by "grinding it together?"

A. It mixed it and ground it.

Q. How did it grind it? Did it break up some of the particles?

A. Possibly.

Q. There weren't any teeth or anything to crush them?

A. There were kind of teeth."

Printed Transcript, p 52.

* * * * *

"Q. Now in relation to this hole or hopper where the material was taken up, wasn't it a mere hole in the ground, or what was it?

A. It is my recollection that there was a hole dug in the ground and timbers were put there to bolt castings on which a chain run to run this other chain. The casting was bolted to these large timbers, and this hopper was built upon it leaving a place for the chain to run through, and the hopper was built up level with the ground, so the employes scooping the sand or crushed rock could scoop on a level with the ground. I suppose it was built for that purpose. That is my recollections of the way it was built.

Q. You said something in your cross examination about the office telephone, was it used in connection with the mixing mill?

A. *Yes, sir, there was a telephone in there and it was the Barber Asphalt Paving Company's telephone. They used that as an office.*

Q. *As an office for the mill?*

A. *Yes, sir.*

Q. How far was that from the balance of the plant or machinery?

A. It stood right next to the tool shed, I judge fifty feet or somewhere along there.

Q. How large a building was it?

A. It had a gable roof, about ten by twelve, or eight by ten."

Printed Transcript, pp. 54-55.

We have analyzed the meaning of the words "factory" and "mill" and their application to the evidence in the case thus closely in order to meet the contentions of the defendant in the Court below, and because we suppose the same contention will be made here, and because we believe that our position and the construction which we contend for, would bear any examination, however analytical.

But in all good faith, we feel and submit to the Court that such a close analysis is really a work of supererogation, and that it is perfectly plain upon a general examination of the statute in the light of the purposes which were intended; and the mere application of well established general principles thereto, show at a glance beyond question; that our construction of the Act, is the one that the legislature really intended.

In this case, as will be seen from the evidence quoted, there was a plant consisting of much heavy machinery, working separately (or together as the case may be) in the performance of different steps in the manufacture. There was an engine for furnishing power, the conveyor for carrying up rock, and another separate one for carrying up said, the revolving drum for heating the product, and the miring machine where the product was ground to-

gether. Each of these sets of machinery were operated by separate gearing, and one could be operated separate from the other, or all together as the necessities of the situation might demand. In connection with this machinery were permanent platforms built out on each side for receiving the raw material, and taking away the manufactured, or partially manufactured product. Offices and tool sheds were built around it, and a considerable number of men were constantly employed.

That this was a manufacturing plant, and therefore a manufactory, or factory, as well as a mill is clearly shown by the authorities we have already cited.

It seems to us that this remedial Statute (for the protection of human life) should be liberally construed.

In 26 Amer. & Eng. Encyc. of Law, page 676, it is said :

“Remedial statutes are made to supply defects or abridge superfluities in the law, and the rule is that they are to be construed liberally, and for the suppression of the mischief, and the advancement of the remedy. In construing remedial statutes, the old law, the mischief, and the remedy must be kept in mind.”

We have already quoted the language of the Supreme Court of the United States in the Johnson case in relation

to the construction of a similar law, which we think is peculiarly pertinent to this case. See page 8 + 9.

In *Caspar vs. Lewin*, 109 Pac. 660, the Supreme Court of Kansas in construing a similar law says:

“Besides this, the interpretation given the Act, serves to carry out the remedial and humanitarian purpose which it seeks to accomplish—the protection of working people from mutilation, physical deformity, physical pain, mental anguish and death, occasioned by the absence of practical safeguards from the environment of their toil.”

Now here is a case where the word “factory” used by the legislature has two meanings recognized equally by lexicographers, and Courts, and both in common use. One of them is clearly broad enough to include the manufacturing plant in question; the other would apply to a building only.

The same is true of the word “mill.” Now why should the Court be asked to adopt the narrow meaning which would not fully effectuate the obvious purpose of the legislature, when the other and broader meaning would give a rational interpretation to the whole Act—clear up all absurdities, and fully carry out the apparent intention of the legislature.

We also think that no other construction, consistent with the language and purpose of the Act, is possible, however narrowly and technically it may be viewed.

It was argued at the trial that the legislature had not seen fit to protect agricultural machinery like threshing machines, and small machines for purely domestic purposes like coffee mills, and that that was a reason for assuming that they did not intend to protect manufacturing machinery unless the same was situated in a building. But we do not see any force in the reasoning. The distinction between these other appliances and manufacturing plants like those in question, and the reason why the legislature included one and omitted the other, is obvious. It was "manufacturing" and "milling" processes that the legislature had in mind, and that they were regulating, and not the mere agricultural or domestic appliances.

Many farmers stake their threshing machines down in the barn. It would be ridiculous to say that it would be any more within the law because it was in a building than it would be if it was out in the open.

So a common domestic coffee mill would be no more within the law if kept in a building, or hung up in a kitchen where employes worked and sometimes used in preparing lunch for employes, than if it was used out of doors.

However, if a firm was engaged in the manufacture of coffee in its broadest sense, and had elaborate and complicated machinery moved by mechanical power for the grinding of it, could there be any doubt that it came within the spirit and letter of the law?

It has been suggested that the steam shovel and the wrecking car may be compared with this plant, but we submit here again, the distinction is obvious. Neither of these machines have anything to do with manufacture, in

any proper sense, any more than the machinery for mining, or the machinery for drawing trains upon a railroad. It may be they should be protected, but they were not within the class—manufacturing and milling machinery, which the legislature had in mind in this particular enactment.

It does not seem to us necessary to consider whether or not the law would apply to small concrete and asphalt mills operated by hand power, and having no elaborate or dangerous machinery. Some such machines might be very close to the line, and whether they were or were not within the law, would depend upon the character and extent of their operation, and the manner in which they were operated, and the character of the machinery and power employed.

Here, there was a regular plant established, at a given place for a considerable time, operated by a heavy engine, and including gears, shafts, set screws, pulleys, couplers and nearly every kind of machinery designated and protected by the statute. The processes carried on were manufactures, and if the plant was not a factory and mill, it was only because it was operated in the open, rather than within four walls.

It was urged at the trial that the permanence of the plant affects the question of whether it is a “mill, factory or workshop.” Even if that is true, this establishment

was at least semi-permanent in its character—sufficiently permanent to bring it within the statute under any reasonable and sensible rule. It is perfectly plain from the evidence that its location was fixed for months, and probably for years. Parts of it were set into the ground, and platforms, buildings, and offices were constructed around it.

A portable saw mill is always intended to be moved from place to place, as the timber in its immediate locality is exhausted. So many factories are more or less peripatetic. It could hardly be claimed that a factory where manufactures were carried on was less a factory because it was only established in one place for six months or a year. Or because the establishment was moved from one place to another in accordance with the demand for its product or other interests of the owner.

Naturally the consideration of this particular feature is of much less importance than the character and size of the plant; the capacity of its output, the nature of its machinery and power and the character of business carried on.

The fact that it was probably expected that this plant would be torn up and relocated at some other city at some future time, certainly could not take away its character as a manufacturing plant.

We do not attach any importance to the fact that the central part of the plant was constructed on wheels,

nor can there be any reasonable distinction on that ground. It is not possible that an employer can relieve himself from the obligations of the law by placing his factories or mills, on wheels, or even by removing them every six months from one point to another.

At the trial much stress was laid upon the decision of the Supreme Court of New Jersey, in *Griffith vs. Mountain Ice Company*, 65 Atlantic, 853, in which the Court seems to assume that the word "factory" imports a building. But this was a mere loose observation of the Court upon a question no way involved in the case. We say "no way involved" because the injury in question actually occurred *in a building*, and therefore the question of whether a building was essential, could not arise, or be involved, and the observation of the Court was mere dictum. The question not being in the case could not have been presented by attorneys, or carefully considered by the Court. The decision of the Court was really based upon the ground that the business of conveying ice, in which no process of manufacture was involved, was not a manufacturing, or factory process.

This is clear from the subsequent language of the Court: "That the shaft by which the plaintiff was killed, was not so employed (in manufacturing) is clear, for the reason that the work of harvesting ice is not in any sense a manufacturing process, so that the room in which the intestate was stationed could not be called a factory, or work shop. The mere appropriation of natural objects without imparting to them any added quality, as in the

case of agricultural, or the gathering of natural ice, is not manufacture in the current sense.”

In conclusion, we submit again, that the general purpose of this Act was to protect employes engaged in work about manufacturing and milling plants, and that the construction of the Act ought to be broad enough and liberal enough to carry out its obvious intent in a reasonable manner, and not to be such as to make the efficiency of the Act depend upon an entirely immaterial and collateral consideration, which did not in anyway affect the danger the legislature was trying to obviate, or the safety of the employes it was seeking to protect—that is upon the immaterial consideration of whether or not the place of work was enclosed by side walls, or covered by a roof.

Respectfully submitted,

J. G. THOMAS and W. A. TONER and
BENNETT & SINNOTT,

Attorneys for Plaintiff.

IN THE
United States Circuit Court of
Appeals
FOR THE
NINTH CIRCUIT.

E. L. CASEY,

Plaintiff in Error

vs.

THE BARBER ASPHALT PAV-
ING COMPANY, a Corporation,

Defendant in Error.

*Upon Writ of Error to the United States District Court
for the Eastern District of Washington, Eastern
Division.*

BRIEF OF DEFENDANT IN ERROR.

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We do not deem it necessary to correct some inaccurate expressions used by the plaintiff in error in describing the asphalt mixing machine involved in this appeal though they are in some respects misleading, we will however, try and answer the argument advanced by him and in so doing shall designate the plaintiff in error as "plaintiff" and the defendant in error as "defendant."

Plaintiff says: "We claim that this is one of those cases and that the plant or establishment in question was both a factory and a mill, within the meaning of the law." (P. 7).

He also admits: "We make no question but that the words 'factory and mill' are sometimes used in as narrow a sense as claimed by the defendant herein, and refer to a building in which manufacturing or milling operations are carried on." (P. 6).

This last admission, even when qualified by the word "narrow," when considered in connection with that statute, seems to conclude the argument against the plaintiff, but he insists that the words "factory, mill or workshop" be given a "broad" meaning, or at least one "broad" enough to give him a judgment. The trouble with his case is that no amount of generosity in interpretation will change this statute from meaning what it says, to meaning what it plainly does not say.

See defendant's Exhibit 4, which is a photograph of the Asphalt Mixer involved.

The position of the defendant is that the undisputed facts in this case show that the Factory Act has no application and that the statutory liability imposed by that Act cannot be considered by a court or a jury, and, as it is conceded that no common law liability is disclosed, the defendant is entitled to a judgment as a matter of law.

The Factory Act was originally passed in 1903 (Laws 1903, p. 40), re-enacted in 1905, and it appears, as amended in 1907, in Section 6587 to 6598 inclusive, Volume 2, Remington & Ballinger's Code. (Laws 1905, p.

164 & Laws 1907, p. 448.) The title of the Act, except the repealing part, is:

“An Act providing for the protection and health of employes *in* factories, mills or workshops *where machinery is used* and providing for suits to recover damages, sustained by the violation thereof, and prescribing a punishment for the violation thereof.” (Italics ours).

The first section of the Act (1907) as it now stands in Section 6587 Remington & Ballinger's Code and reads (the material part) as follows:

“Any person, firm, corporation or association operating a factory, mill or workshop where machinery is used shall provide and maintain in use * * * reasonable safeguards * * * for shafting, coupling, set-screws * * * and machinery of other or similar description which it is practicable to guard and which can be effectively guarded with due regard to the ordinary use of such machinery and appliances and the dangers to employes therefrom, and with which the employes of any such factory, mill or workshop are liable to come in contact while in the performance of their duties.”

It seems to us that no language can more plainly show that this *section* has to do entirely with safeguarding *machinery* and only such machinery as is *in a factory, mill or workshop*. That is what the Act says in unmistakable language. Only *machinery* is described in this section as being the appliance that must be safeguarded. There is no provision whatever in this section for safeguarding a factory, a mill or a workshop independent of the machinery therein, therefore, only machinery in connection with a factory, mill or workshop is subject to its provisions.

It is undoubtedly true that mere machinery is sometimes referred to as a "mill," but never as a "factory" or a "workshop." If mere machinery constitutes a factory, mill or workshop, within this section, then the words "factory, mill or workshop" therein are entirely superfluous and there is not the slightest reason for preceding the words "where machinery is used" with the words "factory, mill or workshop." It seems to us that the conclusion suggested is beyond debate. We are bound to assume that the legislators put the words "factory, mill or workshop" in the section for some purpose, yet they are entirely unnecessary and without meaning or effect if they do not limit the location of the machinery thereafter referred to.

We are perfectly willing for the purpose of argument to assume that this asphalt mixer is a "mill" in one sense of the word. This conclusion is certainly all that the defendant in error can ask for. He cannot claim more through the words "factory" or "workshop." Webster says that the word "mill" is used in two senses. The word may mean a building or the word may mean what is known as machinery for grinding, etc. We cannot conceive of any argument to uphold the position that the word "mill" in this section is used otherwise than as applying to some building or structure designed to receive and permanently hold machinery, because as above stated, the statute so says and if "mill" and "machinery" were synonymous, then the word "mill" might with perfect propriety be omitted from the Act and the reference therein be to machinery only.

We have used the word "mill" more prominently because we believe it to be more accurate under the con-

ditions shown. The defendant seems more inclined to the word "factory" as the name of this machine. Of course it is not a "factory," but we deem it immaterial in this case which word is adopted so long as it is conceded that both may refer to a building or structure. The meaning of these words, according to the lexicographers is so fully explained in the opinion of the lower court that we will not take the space to repeat it. 192 Fed. 432.

We can conceive of no better argument on the proposition than reference to the language of the section itself, but it may be of interest to read Section 6589 (Laws 1905, p. 165, Sec. 3), which deals with the *same* "factories, mills and workshops" in addition to "store houses, warerooms or stores." We quote:

"The openings of all hoistways, hatchways, elevators and well-holes and stairways in factories, mills, workshops, store houses, warerooms or stores, shall be protected where practicable, by good and sufficient trap-doors, hatches, fences, gates or other safeguards, and all due diligence shall be used to keep all such means of protection closed, except when it is necessary to have the same open that the same may be used."

"Factories, mills and workshops" must be construed to hold their character throughout this Act. They are not to be considered as one thing in one part of the Act and something else in another part thereof. This section has nothing whatever to do with *machinery*, but provides that these *same* "factories, mills and workshops * * * shall be protected where practicable, by good and sufficient trap-doors, hatches, fences, gates or other safeguards." Surely it cannot be said that these "factories, mills and workshops" mean machinery; it is self evident

that the words have reference entirely to permanent structures such as are commonly and popularly designated by those names. Trap-doors, hatches, fences and gates are not meant to be placed on or in machinery, but on or in some sort of an enclosed and permanent structure such as we ordinarily designate as factories, mills and workshops. Therefore, we may conclude that the law requires certain safeguards in regard to mill *buildings* and certain other safeguards in regard to *machinery* used therein.

Without quoting from the different sections of this Act, we briefly call attention to the fact that many times therein the expression is used (after referring to factories, mills and workshops) "and the machinery and appliances therein contained" or "the machinery therein used" or "machinery or appliances therein." These expressions, it would seem, mean and can only mean that the class of machinery referred to is that used *in* buildings known as factories, mills and workshops.

Every provision in the law which applies to a factory or to a mill or to a workshop, applies equally to them all and the fact that these descriptive words are always used together is most excellent evidence that they all refer to some permanent structure which is so designated. We believe that at no place in this law are the words "factory, mill and workshop" used otherwise than together. This fact brings them within the rule cited in 36 Cyc. 1118:

"In accordance with the maxim *noscitur a sociis*, the meaning of a word used in a statute must be construed in connection with the words with which it is associated. Where several words are con-

nected by a copulative conjunction, they are presumed to be of the same class, unless a contrary intention appears."

The counsel say on page 12 of brief that Section 6588 throws more light on this question. This section has to do with providing closed rooms with ventilation and keeping them in a cleanly and sanitary state. We think that counsel is right. This section does throw some light on the question, but hardly in a way that is to the plaintiff's advantage. After referring to factories, mills or workshops where machinery is used in a closed room it excepts "private houses in which the employees live." If factories, mills and workshops did not mean buildings but machinery, *houses* would not be excepted in this language nor would there be any reference to enclosed rooms in factories, mills or workshops unless such factories, mills or workshops were structures or buildings. The section further provides the method of removing impure air in the enclosed rooms in these same factories, mills and workshops.

The plaintiff's statement of what this section provides is so very inaccurate and seriously misleading that we will reproduce it:

"Section 6588. Every factory, mill or workshop where machinery is used and manual labor is exercised by the way of trade for the purposes of gain within an inclosed room (private houses in which the employees live excepted), shall be provided in each workroom thereof with good and sufficient ventilation and kept in a cleanly and sanitary state, and shall be so ventilated as to render harmless, so far as practicable, all gases, vapors, dust or other impurities, generated in the course of the manufacturing or laboring process carried on therein; and if in any factory, mill or workshop, any process is carried on in any inclosed room thereof, by which

dust is generated and inhaled to an injurious extent by the persons employed therein, conveyors, receptacles or exhaust fans, or other mechanical means. shall be provided and maintained for the purpose of carrying off or receiving and collecting such dust."

This is the law of which the counsel says on page 12 of his brief:

"Section 6588 of the Code, deals with a different condition than the preceding section. That is, with conditions which could only occur within doors, viz.: bad ventilation, and therefore the legislature very properly saw fit to limit it to factories, mills and workshops 'within an enclosed room.' This limitation would have been entirely unnecessary if 'all' factories, mills or workshops must necessarily be in enclosed rooms."

The Court will note that counsel are greatly in error in saying that this section is limited "to *factories*, etc., within an enclosed room." The law is directed to "an enclosed room" in a "factory, mill or workshop" "where machinery is used and manual labor is exercised." In other words counsel should have said that this section referred to *enclosed rooms* in *factories*, not *factories* in enclosed rooms. Only the defendant can be aided by Section 6588.

The concluding section (6598) provides that the certificate of inspection shall be kept posted in a conspicuous place "on each *floor* of every factory, mill, workshop, storehouse, workroom or store" to which the provisions of the Act are applicable. That is additional evidence of the most conclusive character that the "machinery" referred to in Section 6587 is such as is used in a factory, mill or workshop, for mere machinery has no floor in the sense meant. Of course that term as here used means what is commonly referred to as a "story."

It is used in the same sense that we say that a building is ten stories high.

It is said by plaintiff's counsel that there is no reason why machinery like that here involved should not be protected and that therefore the legislature intended to protect such machinery. That hardly answers our contention. There are many machines and much machinery that is as dangerous or more dangerous than that here involved that is entirely without the statute. It is almost impossible to create legislation of this kind that is perfect in its application, and we do not know of any legislature that has had the assurance to believe that their legislation had corrected all conditions that might properly receive attention. They had to stop somewhere and they did stop in this case with machinery contained in factories, mills and workshops, because that character of machinery confessedly was more in need of attention than any other.

We may, so far as the defendant's case is concerned, concede for the sake of argument that it is prudent to guard machinery *outside* of a mill or workshop, but that does not change the law. We can readily see one conspicuous reason why the legislature limited the machinery which they legislated concerning. Such machinery under the law must be inspected and a certificate of inspection posted permanently in the building containing the machinery so that its absence or presence will advise employes of the status of the place. Such a proceeding would be, from a practical standpoint, impossible in connection with machines like the one in this case, without floors, of a portable nature and the location of which could not at any time be with certainty ascertained. To

adopt the construction contended for by plaintiff's attorney would require *every piece of machinery in the state* to be guarded and instead of the single inspector and a deputy hundreds of men would be required to carry out (and then only imperfectly) the law.

In our opinion, a threshing machine is essentially more dangerous than the one herein involved, because of its characteristics and because the employes working about it are not necessarily skilled or acquainted with the dangers. The work of many of them is but temporary and, naturally, acquaintance with its mechanism and the attending dangers is not close. But it is conceded that a threshing machine does not come within the law. It may be that some time the legislature will seek to protect against dangers from other machinery than that in "factories, mills and workshops," though we doubt it will be extended to include all machinery because of the impracticability of successfully carrying out such legislation.

There is danger from the machinery of a portable feed mill, corn sheller, mortar mixer, wood sawyer, steam shovel and many other similar machines, but it would be almost impossible to frame a law that could, from a practical standpoint, be applied thereto; hence, so far the legislature has sought to regulate only machinery used in "factories, mills and workshops," and has excluded machinery of the character here involved, which is a portable asphalt mixer mounted on railroad trucks to be taken from one paving job to another, and is permanent only to the extent of being run off from a railroad line, on rails which are thereafter taken up between the

machine and the railroad, until such time as another job shall make it necessary to move the machine to another place in the same city or to another city or state.

On page 35 of brief counsel say: "It was 'manufacturing' and 'milling' processes that the legislature had in mind, and that they were regulating, and not the mere agricultural or domestic appliances." That can only mean that the *purpose* of the machinery is the criterion and not the *place* where it is located. Of course, in adopting this line of argument, counsel are in effect nullifying the words "factory, mill and workshop" in this statute, and we can only say that the Court can not amend the statute. By this argument counsel depart from the rule of construction which they have heretofore adopted. They have said in effect that the attending danger was the criterion and that the legislature could not have thought it was more necessary to protect *enclosed* machinery than that which was unenclosed. They now say that the legislature thought it was more necessary to protect *manufacturing and milling machinery* than that used for *other purposes*. Why, they do not say. The fact is that an attempt to ignore the words of the statute or assume other words therein is bound to result in utter inconsistency and confusion.

Threshing machines are usually operated at different places out of doors for the simple purpose of convenience. It is easier to take these machines to the material which they are to operate on than it is to take such material to the machines. In respect to this asphalt mixer, it is easier to take the machine to the place where the paving is done than it is to have it stationary and take the asphalt mixed thereby to the different cities wherein pav-

ing is done. It was not the *purpose* of this law to except agricultural or domestic machinery as suggested by plaintiff, but rather the *effect* of the law, for there is no greater humanitarian reason why the machinery in a machine shop should be protected than that which abounds in a threshing machine or elsewhere. There is no reason for discriminating in favor of the machinery referred to in this Act except practicability and expediency as suggested hereinbefore. The law had to stop somewhere and it did stop when it had provided for the safety of employes in connection with the machinery in a factory, mill or workshop.

It is said that our contention is technical as to what constitutes a factory, mill or workshop under the Factory Act. We must deny this. Our contention is that the word "floor" as used in the Act presupposed a structure and has the same meaning that both counsel and ourselves would intend when using the word in connection with factory, mill or workshop. A factory, mill or workshop only one story high would be as completely within the act as such a building containing ten stories. We are not contending that the word "floor" must be understood in a technical or narrow sense. We concede that an ordinary foundry, as we understand them, which has no other floor than the ground might come within the terms of the Act. Such ground so occupied would be a floor according to the common usage of the English language. Neither do we contend that a building in order to be a factory, mill or workshop under the Act must be air-tight, nor do we think that the Court should try to limit the well-known meaning of expressions heard every day. What we do contend is that there

must be some sort of an approach to a structure known as a factory, mill or workshop as those terms are ordinarily understood, before the machinery therein is brought within the terms of this law.

We can easily conceive of factories, mills and workshops which are more or less open, perhaps on the sides and perhaps on the top, but we can not conceive of a factory, mill or workshop, as meant by the statute, created by the temporary location of mere machinery out of doors and where there is not the slightest attempt to connect it with such structures or buildings as are commonly so designated.

The lack of distinction between a "mill" as a building and "mill" as machinery was sought to be sustained in *Leavitt vs. Dow*, 72 Atl. (Me.) 735, under a taxation statute, but the Court said:

"One and the same thing cannot at the same time serve as personal property employed and as the building or place in which it is employed."

Our contention is clearly upheld by the Supreme Court of New Jersey in *Griffith vs. Mountain Ice Company*, 65 Atl. 835. It was claimed in that case that shafting and machinery used to carry ice was within the statute which required that belting, shafting, gearing, etc., in all "factories and workshops" should be guarded. The Court held that although the machinery referred to was enclosed in a little house for the occupancy of the man who by a lever started and stopped the ice conveyor, the words "factory and workshop" were a limitation on the character of the machinery which the law required guarded. The Court held that the statute did not apply for two reasons, one of which was expressed as follows:

"We think that the defendant's plant does not come within the statutory language 'factories and workshops,' * * * because those words import a building in which the machinery is so placed as to be dangerous to operatives."

The Court also said:

"Obviously the statute was not intended to apply to all cases in which shafting, belting and gearing were employed; for if that had been the legislative purpose, the limitation 'in factories and workshops' would not have been used. Some meaning must therefore be given to these words of limitation, and the one I have suggested is that naturally arising from the context."

We also ask the Court's attention to the opinion rendered in the case at bar. It is found on page 15 of the record and in 192, Fed. 432.

Counsel say that the Act regulating the compensation of injured workmen, known as the Employers' Liability Act, contained at page 345 of the Laws of 1911, supports his contention. Because the Compensation Act contains a definition of the words "mills, factories and workshops" the plaintiff asks that this Court should follow that definition. Similar methods of abbreviation are commonly used in legislation as well as in written agreements, but they are absolutely without force outside of the document in which they are found. This, of course, is recognized by the language of Act referred to, which says, in respect to the definitions therein contained (Section 3) that the "words employed mean as *here stated*." It would have been unnecessary to fix the definition of these words had they been, in themselves, commonly defined as contended for by counsel. That they were not sufficiently broad is the precise reason why it required

an act of the legislature to make them serve the purpose intended. What the legislature desired to do was to cover conditions beyond mere factories, mills and workshops as ordinarily understood and they did not desire to repeat all these different phrases every time reference was made thereto in the Act, so they started out by saying that when they said "factory" or "mill" or "workshop" they meant everything that in their opinion should receive the benefit of this law according to the new policy which prompted its enactment.

In many long and complicated agreements where there are proper names of unusual length, or where it is sought to include different people or things in some one expression for convenience, this same method of arbitrary definition is adopted. The word "company" is many times made to stand arbitrarily for a certain name or names. "Schedule A" or "Exhibit 1" mean, oft times, a number of things or items which it is inconvenient to designate each time they are referred to. That is all that can be said in respect to the force of the arbitrary definitions given in the Compensation Act.

We might add that in paragraph two of that act the legislature has defined what are "extra hazardous" works. The purpose of doing this is, of course, obvious. It was the desire to uphold the police power of the state. They probably have a right to decide that question, but it is equally true that they have fixed as "extra hazardous" many works that were not so before, nor are they so now, except "In the sense of this act." We doubt if "printing" or "breweries" or "wharves" or "building operations" are, at common law, extra hazardous, but they undoubtedly are since this act was passed, in con-

nection with matters covered thereby. There are several other like illustrations which might be referred to, but we think further comment is unnecessary. That act does not govern the one in question. It, in no wise, amends or modifies the act involved in this suit which was passed to require the guarding of certain machinery and not to fix compensation for injuries.

Johnson v. Southern Pacific Co., 196 U. S. 1, is cited. We do not have to quarrel with the Supreme Court in making this decision. It does not militate against our position because that does not require the "narrowest interpretation" to uphold the defendant, nor does the court have to disregard "the apparent policy and objects of the legislature." The case last cited does not become applicable until we ask the court to make a distinction that is at least doubtful, and the plain wording of the statute does not show that we ask this.

The construction which we ask for is not in the slightest degree technical, but is entirely natural. It is so free from technicality that we do not feel the necessity of invoking the rule that because the statute is highly penal, it should be, if necessary, strictly construed. All we ask is that the language be given the meaning that is plainly expressed thereby and not be forced to include *all* machinery, for if the machinery described in the act is not limited to that in factories, mills and workshops, *then as above said, there is no limit* and the act applies to all machinery in the state. It is not a case of trying to *thwart* the *obvious* meaning of the law which is oftentimes charged in an argument in support of extending the terms of a statute, but a case of *following* the *obvious*

intention of the lawmakers as disclosed by the plain terms of their legislation.

The judgment of the lower Court should be affirmed.

Respectfully submitted,

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F. T. POST,

A. G. AVERY,

Attorneys for Defendant in Error.

IN THE

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FOR THE

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PETITION OF DEFENDANT IN ERROR FOR RE-HEARING

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*Spokane, Washington,
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The defendant in error respectfully petitions the Court for a re-hearing of the above cause on the following grounds:

1. That the decision heretofore rendered herein is against the law and is based on a misapprehension of the facts disclosed by the record.

ARGUMENT.

It is said in the opinion: "We are of the opinion that to say that the plant of defendant in error is not embraced in the words 'factory' or 'mill', because not permanently located in a building is an inadmissible limitation of the scope of the terms of the statute. * *

"We see nothing in conflict with it in the fact that the Act of March 6, 1905, as amended by that of 1907, contains many specific provisions applying to factories and mills located in permanent buildings with many rooms and floors."

The statement seems to imply that the act *only as amended* refers to "permanent buildings with many rooms and floors," and that that was one reason for the Court's opinion. We call attention to the fact that Sections 2, 3, 4, 7 and 12 of the original act are aimed specifically at the structural features of factories, mills and workshops, hence they are to be considered in construing this act, even though some of them are not precisely reproduced in the laws of 1907. Sections 4, 5 and 7 were amended but Sections 2 and 3 of the original act have never been amended in any respect and they deal not at all with machinery. Therefore the law as originally enacted, as well as when amended, dealt with the machinery in structures known as

“factories, mills and workshops” and also with factories, mills and workshops as structures and independent of machinery; and when it is conceded, as it must be, that the act deals with factories, mills and workshops as buildings and with machinery used in factories, mills and workshops, then we contend that we have demonstrated conclusively that this asphalt mixer is not protected by the law in question.

We attempted to demonstrate in our brief that one portion of the act was for the protection of buildings and nothing else, because that is what the act says, and notably Section 3. No construction of the English language will permit it to be said that the directions contained in that section have anything whatever to do with machinery.

This Court in its opinion says, “It is, of course, readily conceded that a factory usually and perhaps almost invariably embraces one or more buildings, and where machinery constitutes a part of the factory such machinery is undoubtedly usually housed.”

In view of this statement, which is unquestionably true, how is it possible to say that the Legislature, when it used the word “factory” did not intend to use it in the sense that it “embraces one or more buildings.” It is conceded that it “almost invariably” does this, and there can be no escape from the conclusion that in holding that a factory as meant by the act is not some sort of an enclosed structure is to hold that which is not commonly or even occasionally true but squarely contrary to that which is almost invariably true.

Notwithstanding the expression above quoted, the opinion says that a factory is not absolutely limited to the building or buildings, citing an English definition in Black's Law Dictionary. But here our statute is disregarded. The fact that the Legislature had not the slightest intention of adopting any English definition or of departing from the rule invariably recognized in the United States independent of statute, is disclosed by the fact that *it says what kind of factories it refers to; those which have rooms, stairways, hatchways, floors, windows, doors and like characteristics. We cannot use the word "factory" in one sense at one time and in another sense at another time*, because the statute conclusively demonstrates that the word means the same throughout the act.

This machinery is not enclosed in any such building or structure as is contemplated by that portion of the act involving structures or buildings. Consequently this machinery is not within the terms of the act.

The Court cites statutory definitions from the states of Pennsylvania and Kansas. Only the Legislature of this state can make or amend its laws. If the Legislature of this state had desired to make the words "factories, mills and workshops" include anything more than they do in their ordinary acceptance, it would have so legislated.

The case of *Johnson vs. Southern Pacific Co.*, 196 U. S. 1, 18, has no application here because the intention of the Legislature is clearly expressed by the terms of this act.

This Court says that the lower court held that the asphalt mixer was not a factory, mill or workshop "for the reason that the plant was not located in a permanent building." We do not believe the lower court meant that, if the

opinion means to give emphasis to the word "permanent." It is not our contention that the building must be permanent. We can readily conceive of a temporary factory, mill or workshop. Permanency is not necessarily the criterion, although it may be evidence of the character of the structure. The trouble with plaintiff's case is that the machinery involved is not located in any structure at all. It may be that the court attached some importance to the assumed fact that "there is a tin roof over the vats and rollers." If such a condition would add weight to the plaintiff's contention we would like to suggest a correction, for there is no roof of any kind or character in connection with this mixer. The testimony of plaintiff does not mean that. The vats have no more roof on them than a steam locomotive boiler. Like such boiler, these vats have bottom, sides and top; not for roofing them or enclosing them or protecting them, but as a *part of them* to hold safely what they contain. The ~~top vats~~^{tin roof} referred to by the court are not "over the vats"; they are a *part* of the vats.

We might feel less disposed to urge our contention so persistently and yield to the definition contained in Black's Dictionary, that a factory might be included by the word "premises" if this machinery was even on factory premises or used more or less directly in connection with a factory as defined by this act, but it was not. Even Black's definition pre-supposes the *premises* to be *connected* with a factory in the ordinary acceptance of the term. This asphalt mixer is not on or in premises connected with any structure which can be termed a factory, mill or workshop. The mixer itself is all there is of it, and it is not in a factory, mill or workshop, as directly required by the statute.

Our position is, briefly:

1. That the factory act is directed to structures commonly known as "factories, mills and workshops," independent of whether they contain machinery or not.

2. That said act is also directed to machinery contained in such structures.

3. That if the law does refer to structures independent of machinery and again to machinery contained in such structures, then machinery not operated in the structures referred to is not within the purview of the act.

In view of the fact that the decision herein is far-reaching and will of necessity make doubtful conditions which have heretofore been thought plain, the defendant in error respectfully requests that this petition for re-hearing be granted to the end that it may have an opportunity to re-argue the questions involved.

Respectfully submitted,

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F. T. POST,

A. G. AVERY,

Attorneys for Defendant in Error.

I hereby certify that the foregoing petition for rehearing is not interposed for delay and that in my judgment it is well founded.

A. G. AVERY.

